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Ijarah (Lease)

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بسم الله الرحمن الرحيم

In the name of Allah, the merciful, the compassionate

Introduction

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Praise be to Allah, the AlMighty and peace be upon prophet Mohammad, family and companions.

It is our pleasure to present this research on Shariah provisions of Ijarah and Ijarah Wa AlIqtina, which have been conducted in an attempt to develop an standard for Ijarah and Ijarah Wa Aliqtina. During preparation of this book, consideration is given to showing basic principles of the two types of Ijarah jurisprudence (Figh) i.e operating and lease (Ijarah) ending into ownership. Then light was shed on points which need accounting treatment in order Shariah requirements to be observed thereto.

Certain Figh subjects were briefly tackled while others were excluded, due to the fact that they are not relevant to the subject matter of this research.

Furthermore, Shariah issues which are not required for the purpose of this research were either briefed or dropped. It is also noticed that there is an imbalance in the quantity of data related to some Figh issues. This is because we elaborated on accounting matters.

While other subjects which are not of the basic principles of Ijarah are briefly mentioned.

It is worth mentioning that operating Ijarah is the type which is frequently referred to by jurists of all schools, while Ijarah Wa Aliqtina (Lease ending into ownership) is one of the newly introduced modes of Ijarah contract. So in referring to the latter we concentrated on the findings of conferences and symposiums, with particular reference to Kuwait Finance House symposium and the Fifth session of the International Islamic Figh Academy held in Jeddah as well as researches prepared by Islamic banks researchers and Fatwas issued by their Shariah boards. We also pointed to some standard contracts applied by these banks and observations regarding conditions and procedures for implementing modes of Ijarah.

Finally in this research on Ijarah, we confined the study on the two types of Ijarah (i.e operating and Ijarah ending into ownership) which their subject matter is usufruct possession, while Ijarah which its subject matter is labor (i.e. hiring persons either private or common) is not included, because it is usually tackled in legal

studies under the name (labor contract) for which there are special provisions and applications.

May Allah guide us through the right way.

Adnan A. Yousif

Chief Executive Officer

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1- Ijarah:

1-1 Ijarah definition:

It is defined by jurists as: "Possessing of a usufruct for a consideration"(1). Malaiki school of Figh mostly confines the term lease "Ijara" contract to the human usufruct and the moveable objects other than vessels and animals. They call the contract on usufructs of land, houses, vessels and animals the term "Kiraa", so they said Ijarah and Kiraa have the same meaning.(2)

This is a brief definition for Ijarah which combines almost intentions of jurists "Fugha" regarding definitions presented by them which reflect the nature and some features of Ijarah.

One of the definitions of Ijarah according to Hanafi School is that it is a contract which enables possession of a particular intended usufruct of the leased asset (Ayn) for a consideration. Some jurists stipulated that the usufruct from the leased asset should be intended while others explained that what is meant by it is considerable

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(1)Kashf Al Haqaig 2/151, 1322H edition, Mabsut 15/74, first edition, Al-umm 3/250, first edition, 1321H,Al Mughni with Al-Sharh Al-Kabeer, and Al-Sharh Al-Sagheer , Al-Manar 1347H.

(2)Al-Sharh Al-Sagheer Alaa Aghrab Al-Masalik, 4/5 and Al-Sharh Al-Kabeer by Al-Dirdeer with Hashiat Al-Disoogi 4/2 Dar Al-Fikr edition

intentions in light of Shariah and reasoning and not mere intentions.

Maliki school of Figh defined it as "a contract which relates to permissible usufructs for a particular period and a particular consideration not arising from usufruct".

Shafie school of Figh defined it as " a contract for a defined intended usufruct liable to utilization and accessibility for a particular recompense". While Hanbali school of Figh defined it as: " a contract for a particular permissible usufruct which is taken gradually for a particular period and a particular consideration"(3).

1/2 Description of Ijarah (Charging ruling & Evidence):

Ijara contract is permissible in principle(4), the evidence is drawn from the Quran, the prophet's Sunna, the consensus (Ijmaa) and reasoning:

As for the Quran, Allah almighty says: "and if they suckle your (offspring), give them their recompense"(5), and " Said one of the

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(3) Al-Figh Alaa Al-Mazahib Al-Arbaa 2/95-98
(4) Al-Mughni with Al-Sharh Al-Kabeer 20/6, Bidayat Al-Mujtahid 2/251
(5) Surah Al-Talaq /6

(damsels): "O my (dear) father! engage him on wages: truly the best of men for thee to employ is the (man) who is strong and trusty, He said: "I intended to wed one of these my daughters to thee, on condition that thou serve me for eight years; but if thou complete ten years, it will be (grace) from thee. "(6). Also, Allah almighty says: "Then they proceeded: until, when they came to the inhabitants of a town, they asked them for food, but they refused them hospitality. They found there a wall on the point of falling down, but he set it up straight. (Moses) said: "If thou hadst wished, surely thou couldst have exacted some recompense for it!" (7). However, with regard to Sunna, the messenger of Allah, peace be upon him, has said:"He who hires a worker must inform him of his wage"(8), and also said: "Give the worker his wage before his sweat dries"(9). It is evidenced that the prophet, peace be upon him, and Abubakr had hired a guide from Bani Al-Deal, then the prophet said : " Three people I shall be their enemy in the doomsday" then

(6) Surah Al-Qasas / 26
(7) Surah Al-Kahf / 77
(8) Narrated by Al-Baihagai by AbuHurairah
(9) Narrated by Ibn Majah

he mentioned : " A man who hired a worker to carry out some work for him, but did not give him his wage"[10].

With regard to consensus, there is an agreement among the Ummah from the time of Sahaba "companions" up to this day to conduct Ijarah, no one violated this consensus except AbdulRahaman Ibn Al-Assam who opined that it is prohibited due to Gharar as it is a contract on usufructs not yet found, but jurists refuted his argument indicating that here Gharar shall be ignored because the contract on usufructs is not possible after the existence of usufructs because they perish as time passes so a contract for them should be concluded before they come to being such as Salam contract on assets.

The evidence from reasoning is that, Ijarah is a means of facilitating life by helping people to get the usufructs of assets which they do not own, and the need for usufructs is similar to the need for assets themselvesi.e. the poor needs the wealth of the rich while the rich needs the poor's labor, and consideration of the people's need is a basic principle in contract legislation where contracts are legislated to fulfill such needs and requirements in

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(10)Narrated by Al-Bukhari in "sales" and Ijarah sections of Sahih Al-Bukhari

conformity with Shariah[11]which is considered the rationale behind such legislation. No doubt, all people need such transactions because not every one has a house and not every traveler is able to own means of transportation as well as craftsmen work for hire and since most people can not do such type of jobs or find volunteers they should hire or rent others to do such jobs n their behalf[12].

(11)Almabsut 15/74 and 75, AlBadaie 4/174, Bidaiat Al-Mujtahid 2/20, 1386H edition.
(12) Al-Mughni, Ibn Ghudammah, 5/356

1-3 Pillars of Ijarah:

According to consensus of Muslim jurists (Jamhour), Ijarah has three pillars and six sub-pillars:

- Text is constituted of offer and acceptance
- Contracting party which is constituted of two parts: Lessor who is the owner of the asset (Ayn), and lessee who is the beneficiary of the property.
- The subject of the contract which is comprised of two parts: Rent and usufruct. Attention shall be drawn to the fact that the usufruct is considered the subject matter of the contract since it is the object that is used or utilized in return for rent, therefore it is guaranteed rather than the asset (Ayn), so the asset (Ayn) is not the subject of the contract, yet Ijarah contract sometimes encompasses it as the subject of usufruct, for example: " I rent you the car"[13] .

  Hanafie scholars opine that the pillar of Ijarah is restricted to the text only and consider the contracting parties and the subject matter of the contract as constituents of the contract.

(13) AlFigh Alaa Al-Mazahib Al-Arbaa 2/98

Ala eddin al-Samarghandi explained the nature of Ijarah contract and its difference from sale where he said: "Ijarah takes place by utilizing the usufructs while maintaining the asset (Ayn)" (14).

1-3-1 Ijarah text:

Text of Ijarah is the manner through which the will of both contracting parties is demonstrated in terms of expression or its equivalence, by an offer issued by the owner "The holder of the asset", and acceptance issued by the would be possessor pursuant to consensus of majority of scholars (Jamhour), whereas Hanafie school of Figh opines that "The offer is what is issued first by either of the two contracting parties, and acceptance is what is issued later by the other contracting party".

The text is stated by any expression that explains the intention of the contracting parties which is a general rule of all contracts, as the expression shall show clearly the purpose and intention of

(14) Tuhfat Al-Fugha, Samraghandi, 2/529.

the contracting parties from the expressions they make which should avoid doubt, suspicion and dispute as Shariah did not identify or define specifically wordings and expressions of contracts, on the contrary it made such expressions general and absolute in nature so that people may use the expressions and wordings that reflect their purpose and intention as well as identify the meanings which they intend.

So Ijarah contract is concluded by any expression of Ijarah whether he refers it to the asset in expression like if he says " I lease you this house" or refers it to the usufruct, like if he says " I lease you the usufruct of the house".

Also it becomes a contract by spelling out the expression of "Kiraa" "Hire" like if he says: "I hire you this house" or "I hire you its usufruct".

Also, Ijarah contract is concluded if we refer to the wording of "ownership" added to the "usufruct" like if he says: " I transfer you the ownership of this house's usufruct". Also it is concluded by spelling out the sale and add it to the usufruct like if he says: " I sold you the usufruct of the house" or " I sold you the dwelling of this house".

1-3-2 The contracting parties:

For conclusion of contracts each of the two contracting parties should possess the requisite capacity that is to say, they should be of sound mind and perfect discretion. It is unanimously agreed that the contract of Ijarah is entered into only by a party who is authorized to deal in wealth.

It is a condition that for the accuracy of lease contract it should be concluded upon mutual agreement of both parties, and that each contracting party should have the competence "Walaia" to conclude the contract according to opinion of Hanafie and Maliki school of Figh, which consider competence (Walaia) a condition for the execution of the contract.

1-3-3 The subject matter of Ijarah:

Usufruct and rent are the subject matter of Ijarah contract. The details in this respect will be discussed later.

1-3-1-1 The immediate Ijarah:

The basic principle of Ijarah is that it must be immediate. If immediate nature of Ijarah is not obstructed by something, or

the contract commencement is not stated clearly, hence Ijarah shall commence at the time of contracting, and becomes immediate Ijarah.

1-3-1- Ijarah for a future date:

The ruling of jurists (Jamhour) does not differ with regard to permissibility of relating Ijarah to the future. However, Hanafie school of Figh considers it an un-binding contract and thus restricts the binding effect to the prompt Ijarah.

The Shafie school of Figh has restricted the case of tying up Ijarah to the future to the lease described on liability and not lease of a particular asset (Ayn) where addition to the future is prohibited but if he lets the asset in the second year to the lessee of the first year, before the first year elapses – in such case it is permissible according to opinion of Shafie(15).

(15) Minhaj Al-Talibeen, AlNawawie, 67

1-3-1-3 To tie up Ijarah to occurrence of an event:

Jurists (Fugha) agreed that lease is not susceptible to being tied up – like sale –Qadi Zadah, a Hanafi jusrist, has said:" Ijarah is not liable to being tied up, however it may come in the form of tying up but in fact it is an addition, as you may say to a tailor :"if you tailor this cloth today I shall pay you one dirham, and if you tailor it tomorrow I pay you half a dirham".

It may be said that this mentioned form is related to "reducing the rent – which is permissible – but not tying up of Ijarah"(16).

1-3-3-1 The two types of Ijarah:

First : The contract is executed for a usufruct of a particular asset (Ayn) e.g some one says to the other :"I let you this house", or the contract is executed for usufruct of an asset described on liability e.g. I let you a camel whose description is so and so.

Second: The contract is executed for a particular work, e.g. some one says to the other :" I hire you to build me this wall or

(16)Nataij al-Afkar, 7/210, Matalib Awli Al.Noha 3/77, Nihaiat Al-Muhtaj 5/295, 260, Bidaiat Al-Mujtahid 2/135 and Al-Mughni.

make me this box, or any other type of contracting with craftsmen as the contract is made for the work provided by them, though the ultimate goal of this contracting is to acquire the resultant usufructs, but the subject of the contract which is composed of the work and the usufruct comes as a consequence of it akin to the case of irrigation (Musaqat) contract where the orchard is the subject of the contract and the usufruct of fruits comes as a result[17].

1-3-3-2: Usufruct of the leased asset:

The subject matter of Ijarah is either lease of usufructs of particular assets or lease of usufructs described on liability. The lease of an asset is the lease on the usufruct of a particular asset such as: property, animal or human benefit. The lease described on liability is set for a described usufruct "benefit", while being on liability like renting a car described on by agreed on specifications, as to say: "it should be on your liability to rent me the car". Hanabali jurists set a condition – which is one of the two opinions by shafite jurists- that rental shall be advanced

(17)Al-Figh Alaa' Al-Mazahib Al-Arbaa' 2/99

in case of a lease described on liability to avoid sale of debt for debt[18]. If it is generally stated without mentioning the liability, then it becomes lease of an asset(Ayn) [19].

1-3-3-3 Conditions of usufruct:

Following are the conditions set for executing of the Ijarah for usufruct:

First: Lease shall be effected on the usufruct rather than utilizing the asset (Ayn), a matter which is agreed on unanimously.

Second: The usufruct should be of the objects that are liable to valuation in terms of money and intended to be utilized according to contract. It shall not be contracted on agreement on permissible things without price because spending money that way is a kind of extravagance.

Third: It is a condition that the usufruct shall be permissible, neither a required piety nor a prohibited sin. This condition is a subject of details and differences between different schools of Jurisprudence (Figh).

(18) Bidait Al-Mujtahid 2/249, Minhaj Al-Talibeen 3/68, and Al-Mohazab 1/399
(19)Al-Mughni 6/8, Kashaf Al-Giaa 3/469, 4/2 -10.

Fourth: For accuracy of lease it is a condition for the usufruct to be capable of being utilized according to Shariah and reality e.g. Renting of a runaway pack animal or the lease of the usurped object from some one other than the usurper as it is impossible to deliver the object.

Fifth: It is a condition that, for the accuracy of the lease, usufruct shall be well known and identified in a manner that abrogates ambiguity and uncertainty which lead to dispute[20].

This condition shall be fulfilled in rent also, because ambiguity in both of them lead to dispute, and this is a matter of consensus among jurists[21].

1-3-3-4 Usufruct identification:

The usufruct is defined and identified by identifying the subject matter, specification of the period, or may be identified by itself, or may be made known by determination and pointing out such as a person who hired some one to transport this food for him to a particular location.

(20) Ibn Rushd, Bidiat Al-Mujtahid 2/180, 223.

(21) Al-Fatawa Al-Hindiah 4/41, Al-Badaie 4/180, Al-Hidaiah 3/252 Bidait AlMujtahid, 223 Al-Muhazab 1/398 AlMughni 5/375, 368, 389 H edition.

Stipulation of the necessity to identify the subject matter of the usufruct has led to dividing the lease – as above mentioned – into lease of assets from which the usufruct is utilized from a particular asset so that if it is damaged lease shall terminate such as letting a house to live in, and the lease described on liability where the usufruct is utilized from what may be fully described, and if it is fully damaged after being identified, the lessor replaces it by another.

Consensus of Muslim jurists (Jamhoor) consider custom and practice in identifying the usufruct of lease, so the manner of use is attributed to custom and practice and the difference in this case is minor and hence does not lead to dispute[(22)]. Also, the usufruct is also identified by stating the period and duration, if the usufruct is known by itself, like letting of residential housing (if the duration is made known, then the value of the usufruct is known, and the variance in the number of residents is limited, according to Hanafie jurists).

(22) Tabieen Al-Haqaiq 5/113, Al-Hidayah 3/241, Majalat Al-ahkam al-Adliah 527 B.C , Al-Sharh Al-Saqeer 4/39 second edition, Hashiat Al-Dasooqi 4/23, 24 Al-Mughni 5/511.

Ibn Ghudammah has said: Period is the controlling and identifying element of the subject matter of the contract, so it should be made known.

Hanbali jurists have set one control, they put a condition that the period should be made known in leasing the asset for a particular period like a house, land, and the human for his labor, pasture, sewing or tailoring, because period is the controlling element of the subject of the contract by which it is identified. However, lease of the asset (Ayn) for a particular work, like lease of a pack animal which is described on liability to be used for riding to a particular location, the period of time is irrelevant.

In this respect it is said that it should be conditioned that it is mostly presumed that the asset is retained if the period prolonged. Shafie jurists agreed with this opinion generally, but according to another opinion by them the said period should not exceed a year, and pursuant to another opinion it should not exceed 30 years.

Opinion of Maliki jurists is similar to this opinion, as they opine that: some leases take different periods, like lease of a pack

animal for a year, a worker for 15 years, the house according to its present situation, the land for 30 years. However, duration of work in assets such as tailoring or otherwise should not be fixed[23].

The usufruct is also identified by defining work in the case of co-worker, like hiring craftsmen and technicians in the joint lease, because ignorance and ambiguity (Jahallah) of work in hiring works is an ignorance that leads to dispute. However in the case of hire of private worker, it suffices that the period of work shall be identified upon hiring him.

It is conditioned that in the case of usufruct and in order to make the contract binding, no excuse is established which hinders benefiting out of it, according to opinion of Hanafie school of Figh, because lease (Ijarah) is in principle a binding contract according to consensus, and shall not be terminated unilaterally, only by retaining the usufruct, and if benefiting of it became impossible then the contract is not binding.

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(23) Al-Sharh Al-Saqeer 4/160, Al-Sharh Al-Kabeer and Hashiat Al-Dasooqi 4/2, al-Forooq: Al-Faarq 208.

Shafie jurists are inclined to an opinion which states that if any event occurs whereby the reason for conclusion of the contract disappears, so that the contract can not be carried out, in such case the contract should be cancelled, as they opined that the contract is terminated since the subject of the contract can not be utilized. Just like the case of a man who hired a dentist to extract his tooth, but the pain has been relieved[24].

(24) Al-Badaie 4/85, Al-sharh Al-Kabeer, Hashiat Al-Dasooqi 4/2, Al-Mohazab 1/396, Al-Moharar 356.

1-3-3-5 The lease of the common property:

In case a usufruct is contracted for in a jointly-owned asset , and one of the partners is willing to lease the usufruct of his share, the lease of such usufruct to a partner is permissible if they agreed so. However, leasing it to a party who is not a partner is also permissible according to consensus of jurists (Jamhoor) (Al-Sahibain from Hanfi School, Shafie, Maliki and Ahmed's opinion) because lease is a type of sale, so the lease of the common property as well as its sale is permissible. The common property is capable of partition of usufructs (Mohaia), so it is permissible to be sold.

1-3-3-6 Lease of a part which can not be utilized:

Some times in application it is not possible to make use of the leased asset in itself as a unit, and the lease is defined as deriving of a benefit from a house or vessel for example, some times contracting is established for an object like reinforcement iron rods which may be used for building a house, or an engine for a turbo plane. Such parts which are not capable of giving benefit as independent units, shall not be subject of contracts in a lease which ends into ownership transaction – Ijarah Muntahia Bittamleek. Also some applications showed that the subject of the contract was a plain lot of land which did not include any buildings or premises, a matter that breaches the condition of fulfillment of usufruct (benefit) of the leased asset.

1/4 Rental:

Rental is a payment in consideration of the usufruct owned. Any thing which is valid as price in a contract of sale may be taken as rent in a lease contract. Consensus of jurists (Jamhoor) said: The conditions of Ijarah are the same conditions of price[(25)]. The rent should be made known according to the saying of the prophet, peace and blessings be upon him: "He who hires a worker must inform him of his wage"[(26)]. If the wage is of a type which can be converted into a debt described on liability like Dirham, Dinar, things estimated by measure of capacity, or by measure of weight or things estimated by enumeration which closely resembles each other, it is necessary that its kind, description, and amount be clearly stated. If there is ambiguity (Jahala) in wage in a manner that leads to dispute the contract is void, and if the usufruct is used an equivalent price should be paid[(27)], a matter that is assessed by experts.

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(25) Al-Sharh Al-Saqeer 4/59, Nihaiat Al-Muhtaj 5/322 , Al-Mughni 5/327, Al-Fatawa Al-Hindiah 4/42, Al-Ikhtiar 2/5 Al-Halabi edition.

(26) Narrated by Al-Baihaqi from Abu-Horairah

(27) Al-Fatawa Al-Hindiah 4/42, Al-Ekhtiar 2/507 Al-Halabi edition.

1/4/1 Form of rental:

Rent may be taken in different forms i.e. money, weighed or measured objects, things estimated by enumeration which closely resemble each other, while stating description and the term if the rental is deferred, it may also be an animal or articles of trade.

1/4/2 Provision of rental in terms of services (Other usufruct):

Consensus of jurists (Jamhoor) has permitted rent to be a usufruct of the kind of the subject matter of the contract, Al-Shirazi said: " The lease of usufructs is allowed whether of its kind or not, because usufructs in lease (Ijarah) is like asset in sale, since assets are allowed to be sold in exchange of each other, this also applies to usufructs. Ibn Rushd said that Imam Malik had permitted letting of a house by living in another house[28].

(28) Al-Mohazab 1/399, Bidaiat Al-Mujtahid 2/23, Kashaf Al-Ginaa 3/465.

1-4-3 Flexibility of rental determination:

Rental may differ according to duration, location and distance. Like if a person says to another: If you sew me this cloth today I pay you one dirham in rent, but if you sew it tomorrow I pay you half a dirham, and if you use this house as a blacksmith you pay 10 Riyal in rental but if you use it as a perfumer you pay rent of 5 Riyal e.t.c(29). in Hashiat Ibn Abideen it is allowed to vary rent according to variance of work, duration, place, worker, distance and load"(30).

It is also possible – in case of invalidation of identification of rental for any reason - to revert to the equivalent rent, which is assessed by experts as a rent of the similar usufruct (benefit), in fact Ibn Taymiah opted to the opinion that it is permissible to free lease contract from identifying the rent then revert to the equivalent rent. No doubt, that is considered a precautionary ruling because in principle it should be identified to avoid reverting to experts, putting into consideration the above stated Hadith which instructs us to inform the worker of his wage.

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(29) Al-Figh Ala Al-Mazahib Al-Arbaa' 2/130.
(30) Rafiq Al-Asfar (Khulasat Hashiat Ibn Abideen) 224.

1-4-2-1 Fixing of rent at contracting and agreement to change it according to a particular benchmark:

Lease contracts have drawn significance in transactions of Islamic Financial Institutions, due to the unique feature inherent in it i.e. their investment portfolios embody assets which makes negotiation easy without the controls required in case of money and debts.

Such leased assets are mostly durable either by their very nature or due to persistent maintenance, as well as leasing investment enables investors to get returns compatible with the investment term because rent is strongly related to term in existence and non-existence according to the perpetuity of the usufruct (The subject matter of the contract).

There is a problem facing the ambitions of contracting parties in lease as regarding the changing nature of lease price, while trying to keep the commitment definite during the period of contract, because using promise for the whole period, and then concluding the lease contract for 6 months for example does not provide the obligatory nature of contracting.

There is a solution i.e. contracting according to equivalent rent which means no rent is determined at contracting, but parties revert to the equal rent for each term by agreement between the two parties – if it happened – or by reverting to expert houses.

It is clear that reverting to equal rent is applied in each lease case whose identified rent is invalidated, but, is it permissible not to define rent and reverts to equal rent in the first instance?

The equivalent rent is identified by reverting to evaluation made by appraisers, is it permissible for the contracting parties to gain time and agree on a rent to be agreed by them for each term, without the right of any of them to rescind the contract i.e. the Ijarah contract remains binding. The contracting parties only agree to determine the equivalent rent but if they differed over this issue they shall resort to experts.

By checking the book of Al-Ikhtiarat (Ikhtiarat Ibn Taymiah) by Al-Baali, it becomes clear that Ijarah is permissible without defining the rental, hence equivalent rental applies. Non definition of the rental is different from ignorance of rental; though reverting to equivalent rental is the remedy in both cases.

The following Shariah opinion (Fatwa) regarding varying rental was issued by Al-Baraka fourth symposium:

"Determination of rent by applying equal pay for following periods after commencement of contract".

"Acknowledgement of determined rent is achieved in the lease (Ijarah) contract if it is agreed on a specified period distributed over intervals, while fixing the amount of rent for the first period and approval of the equal pay for the residual period provided that the equal pay is controlled or related to an acknowledged measure that does not permit dispute, with the intention to make parties of the contract benefit from the change in the level of the rent while keeping the binding nature for all the duration of the contract".

1/4/2/2 Renewal of lease contract to change timing of payment of installments:

No objection to canceling lease contract with annual installments to be replaced by lease contract with monthly installments in order to increase the term, provided that this procedure shall not have effect on previous debts for the used period of the lease contract, whether for full years, or part of them, and actual debts are maintained for the used period, and cancelled for the terms unused, it is permissible then to establish a new contract for different installments pursuant to agreement.

1-4-2-3 Acquiring of rental and its timing:

Hanafi and Maliki jurists are of the opinion that rental is not entitled by the same contract, but it is entitled by stipulation or utilization of the contracted objects, and Hanafi jurists added "acceleration should be made", Kasani said: Rental is acquired only by three ways:

1. Speeding up in the same contract as said by the prophet peace and blessings be upon him: "Muslims are committed to their terms and conditions"[31], the condition of speeding up is not fruitful if rental is added as per the opinion of Hanafie jurists and same like the use of usufruct.
2. Speeding up without any condition: analogical to sale as the case of permissibility of advancing price before delivery of the sold item, because lease is a type of sale as mentioned earlier.
3. Use of contracted object, because as the compensated thing is owned, the lessor shall own the compensation in return, in order to achieve the absolute compensation and settlement

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(31) Hadith of (All the conditions agreed upon by the muslims are upheld", narrated by Abu Dawod and Al-Hakim from Abu Huriera

between the contracting parties[32] to be able to utilize the usufruct even if they could not actually acquire it by delivering the leased asset or the key[33].

(32) Al-Hidayah 2/232, al-Fatawa 4/43, al-Badaie 4/202
(33) Tuhfat al-Fugha BY Al- Samarghandi 2/55

1-4-4 Re-Payment of rental profit in advance:

Acceptance of advanced payment is permissible from Shariah point of view but it should be based on the justification that it is an advanced payment of the rental value and not the profit value of lease (as regarding relationship with the lessee), as this consideration is an internal element which concerns the owner lessor, because the lease payment is an indivisible whole – from shariah point of view – so it shall not be divided into principal and profit, because profit in Shariah is a result of purchase and sale of goods, and the excess price is known as the profit. However in case of Lease all the payment is considered rental which may be advanced partially or wholly (which is a part of the overall rental), also it may be installed, or deferred till the leased usufruct is used.

1-5 Lessor and Lessee Consequential Commitments:

1-5-1 Lessor Commitments:

A- Delivery of leased asset :

The lessor is obliged to enable the lessee to utilize the usufruct of the contracted asset i.e. by delivering the asset to him up to the end of the contract period or the distance. Delivery includes accessories of the leased asset without which the intended usufruct is not possible as per the prevailing practice. Delivery which enables usufruct entails that if any casual incident occurs and prevents usufruct of the leased without being due to the act of the lessee, should be corrected by the lessor, such as refurbishment of the residence or removal of any defect that hampers dwelling.

B- Defects guarantee :

Defect option is established in Ijarah as the case of sale. Defect which necessitates option is the one which results into usufruct shortage which is the subject matter of the contract, even if had been due to lack of lease described on liability, and also even if defect happens before the utilization of usufruct and after the contract.

The lessee has the option either to rescind the contract or utilize usufruct provided the lessee is committed to pay the total rental [(34)].

1-5-2 Lessee Commitments :

Use of asset (Ayn) in accordance with condition, custom and preserving it:

Jurists agree that the lessee is committed to observe in using the asset (Ayn) what it is prepared for. This is provided that conditions stipulated in the contract should be respected and if there is no such conditions, custom and practice should be observed.

The lessee is entitled to utilize the contracted for usufruct fully or partially but not more than what is agreed upon. The lessee should repair any defect of the asset (Ayn) which resulted due to his use[(35)]. It is well known that the leased asset (Ayn) is a trust in the hands of the lessee. If it is damaged without transgression from the latter or due to default of the agreed upon, in an excessive manner, or due to omission in maintenance or custody, then there is no

(34) Sharh AlDor 2/78,279, Kashf Al-Hagiag Wa Sharh Al-Wigaiah 2/65, AlMuhazab 2/405.

(35) AlFatawa AlHindia 4/470 .

guarantee from his side, due to the fact that possession of the rental is permitted, so there is no guarantee.

1-5-3 How to use the leased asset (Ayn):

Jurists opinions are based on following principles:

A- If there is a Shariah accepted condition, It should be observed.

B- If the nature of the leased asset is influenced by variance of use, then it should not be used in hazardous mode, and it may be used gently.

C- Custom and practice of use, whether a general or private practice(36)should be observed.

If a building is leased for the purpose of smithery, and then used for trading or any other purpose which is not more harmful for the building than smithery and nevertheless part of it fell down, then there is no guarantee in such case. However if it is leased for housing and then used for smithery or bleaching and that use resulted in destruction of part of it, then guarantee is obligatory(37).

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(36) AlMoghni 6/2,57,58,129,3,133,138. AlSharh AlKabeer with AlMughni 6/30,32. kashf AlGina 3/465, AlMhazab 394,395,401,402. Hashiat AlGaliobi 3/69. Hashiat AlRashidi Ala Nihayat AlMuhtag 5/297, Mutafa AlHalabi print. Hashiat Aldusogi 4/17,24. AlKharshi 7/39. AlSharh AlSagheer 4/11.33-35. AlBadaia 4/183,184, 402. AlFatwa AlHindia 4/465. Kashf AlHagiga 4/124, AlMabsoot 15/165 and 16/16-25.

(37) AlFatwa AlHindia 4/481, AlMahzab 1/400, Khasf AlGina 4/15,16.

1-5-4 Behavioral conduct of the lessee:

Some jurists stated that the personal conduct of the lessee has no effect on the contract. Neither the lessor nor neighbors has the right to evacuate him from leased house. However the ruler has the right to punish him if he did not refrain from his misconduct and the ruler impose rent on him and compel him to evacuate(38).

A Fatwa in this respect was issued by Kuwait Finance House as follows :

The lessor position towards illegal conduct of the lessee is as follows :

(A) The lessor is not permitted to enter into an Ijarah contract with the lessee, which includes a condition that permits the use of the leased property in a Haram business. If the contract is entered in this way, it would be deemed as a void contract and the act of abomination should be eliminated.

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(38) Al-Fatawa Al-Hindiah 4/463, Hashiat AlDosogi 4/34 and AlSharh AlSagheer and Hashiat AlSawi 4/55.

(B) If the lessee did not stipulate in Ijarah contract to use the leased property in a Shariah non-permitted (Haram) purpose, the following would be considered :

- If the lessor became definitely or most probably aware of the lessee intention, the Ijarah contract would be non-permissible and should be rescinded. The rental would be entitled for the previous peried before rescission. The lessor, for further precaution, may give the rental as charity.
- If the purpose of Ijarah is permissible such as housing and the lessee commits certain personal sins covertly, the guilt would be on the lessee, and Ijarah contract would not be breached.

(C) The lessee would be committed when using the leased asset (Ayn) to observe what is agreed upon in the contract or what is customary in general within the limits of Shariah.

D- The leased asset (Ayn) is a trust in the hands of the lessee, and if it is damaged without transgression of the lessee or breach of the agreed upon, in an excessive manner, and also without default in maintenance and custody, he will not be obliged to give a guarantee.

If a non-Muslim leased a house from a Muslim to use as a church or a wine bar, the majority of jurists (Malaki, Shafi, Hanbali and Hanafi) consider Ijarah as void because it is used for committing sins.

1/6 Maintenance of the leased asset (Ayn) :

It is not permissible to stipulate that maintenance should be carried by the lessee, because this results into ambiguity of rental, so Ijarah would be void by this condition as agreed by all schools of jurisprudence. If this happens and the lessee resides in the building, he will be entitled for estimated equivalent charge and has the right to reimburse his expenses on the building and a similar expense for supervision, if he has done so by his permission, otherwise he would be a donor(39).

The leased house is a trust in the hands of the lessee, which should not be guaranteed except in case of transgression or default. The house accessories such as keys are also a trust. If any of the items needed for enablement of usufruct is defected, no guarantee is needed.

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(39) AlFatawa AlHindiah 4/443, Kashaf AlGina 4/16, Nihayat AlMohtag 5/264,265. Hashiat AlDosogi 4/47, Sharh AlKharshi 7/47, AlSharh AlSagheer 4/63.

The lessor is committed to refurbish the building and repair any defects which hamper its dwelling. If he refused, the lessee has the right to rescind the contract, unless if the property has been leased as it is, as per the opinion of the majority of jurists[(40)]. According to the school of Maliki and some Hanafi the lessee is not compelled to repair any leased asset in general. The lessee has the option to live in the house and pay the full rental or leave. If the lessee pays certain repair expenses without permission or delegation by the lessor, he would be considered as donor. At the end of the lease the option may be given to the house owner either to pay repair expenses or to demolish same if possible[(41)], provided that the lessor has not stipulated that he should not be reverted to in that respect. However if the lessee maintained the leased asset (Ayn) without the lessor`s permission, the former would be a donor and hence has no right to revert to the latter.

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(40) Sharh Al-Dor 2/300, Hashiat Ibn Abdeen 5/66, AlMohazab 1/401, Kashf AlGina.

(41) Hashiat Al-Dosogi 4/45, AlSharh AlSagheer 4/70,71, Sharh AlDor 2/300.

In case of a lessee default which is considered by the lessor as a major default but not in contradiction with the purpose of contract, in this case he will be considered as transgressor and he should guarantee any damages incurred by the leased asset.

1-6-1 Group Fatwas on leased asset (Ayn) maintenance:

1st :The lessor is not obliged to make structural or improvement repairs unless if conditional in the contract[42].

2nd :The lessor is obliged to make necessary repairs to enable the lessee of usufruct, in case a defect occurred after the contract date or has been exsishing at contracting but not known to lessee.

However if the defect was exsishing before contracting and known to lessee, the lessor is not obliged to rectify it unless stipulated in the contract. In case the lessor undertakes the repairs as stipulated in above paragraph, the lessee in this case has no right to rescind the contract. However if the lessor didn't perform the repairs, he will not be compelled to do so and the lessee may rescind the contract.

(42) Third Figh Symposium, Kuwait Finance House, third item

3rd :As a major principle in this respect is that the lessor may not stipulate on the lessee to make maintenance for any defects of the leased asset. If the contract included such a condition, it would be void due to ambiguity.

Following cases are excluded:

A. Operating maintenance: which is a requirement for smooth use of the leased asset (Ayn) continuously (such as oil for machinery and equipment).
B. Periodical maintenance: which is necessary for sustaining the capability of the asset to provided usufruct.
C. Established maintenance : which is described and quantified in the contract or common practice, whether that maintenance is mere work or with specified parts and materials, because such items are considered as rentals which are given due consideration.

4th : In case the lessor gave the lessee permission in the contract or afterward to make certain repairs on the asset, he may undertake such repairs, and may revert to the lessor to reimburse his expenses unless the latter didn't stipulated not to

revert to him. However if the lessee undertook the maintenance of the leased asset without the lessor`s permission, the former has no right to revert to him, and hence he is considered as a donor.

1-6-2 Summary of the research on the maintenance of the leased asset:

The summary of research includes the brief response by D. Hussein Hamid Hasan on the topic:

“Responsibility of Maintenance works for Ijarah of Equipment”,

in reply to three questions put forward by Islamic Development Bank. The three questions are as follows:

1-6-3 The first Question :

Is it possible to categorize different maintenance works as above described to identify which of it to be borne by the lessee without contradicting with the requirements of the lease contract ?

Answer :

Maintenance works may be divided into following categories :

1. Maintenance required for proper operation of machinery or equipment i.e. by applying equipment operation instructions along with requirements for revision and follow up of readings of temperature water, oils, etc. meters. In addition to their inspection to verify its properness during operation hours and their calibration, if needed. All these works are the responsibility of the lessee, because they are necessary for the utilization of the leased asset usufruct and not for enabling of its usufruct. They are also necessary for optimum usufruct and not its source or origin, and that is within above stated controls and based on some branches of jurisprudence in which jurists stipulated similar duties on the lessee and per common practice in this respect.
2. Preventive maintenance : which include specific works which should be done on specific dates, in which certain parts of the equipment are calibrated and some replaced, even if they are still proper to use. These are the responsibility of the lessee as per the contract in general because they fall within what is required for utilization of

usufruct and not for enabling usufruct, or necessitated for optimum usufruct and not its source or origin, based on some branches of jurisprudence and common practice.

3. Maintenance which include repair or replacement of major machinery or equipment parts, which frequently would not be defected unless for unexpected casual incidents and need expensive costs and highly technical experience. These are the responsibility of the lessor (the bank) as being considered as necessary for enabling usufruct and not for utilizing usufruct or a necessity for the origin of usufruct or its optimum use. They could be based on jurisprudence cases on which necessary maintenance for proper operation and preventive maintenance are based. Obliging the lessee to undertake the two first types of maintenance is not in contradiction of the contract requirements, because the Ijarah contract is considered as usufruct of the lessee of the leased asset (Ayn) in consideration for rental. However maintenance works and which party should perform it, this is part of the contract provisions and consequences in general, i.e.

in absence of a condition. These are the rights and obligations which the Ijarah contract parties may agree in a matter which satisfy their interests, provided that such arrangements are not contradictory to Shariah. If they abstain from such arrangements, the provisions and consequences of the contract should be applied according to Shariah.

1-6-4 The Second Question:

In case some of maintenance types which Figh obliges the owner of the leased asset (Ayn) to perform, is it permissible for such owner to agree with the lessee to undertake such maintenance against reducing the rental?

Answer :

1- It is permissible to stipulate that the maintenance should be the duty of the lessee, as an increment above the rental specified in Ijarah contract i.e. the lessor may inform the lessee that he has leased an equipment to him for one thousand, provided that the latter maintains

the equipment out of his own money and not from the renral. This is based on the following Figh principle:

“The essence in contracts and conditions is propernes and permission, unless forbidden by a Shariah text” .

This is also based on some jurists opinions in that respect such as the lessor may stipulate that the lessee should perform cartain works similar to maintenance of equipment and machinery in addition to the rental specified in the contract. These works include for example the condition to provide fodder to a leased pack animal and its expenses during the journey and refurbishment of a house, if they are well described to the extent that eliminate gross ambiguity. Other conditions include plowing and fertilizing land by the lessee.

2- Maintenance works may be stipulated to be done by the lessee and their costs to be deducted from the rental. The lessor may inform the lessee that he has leased the equipment to him for one thousand, provided that the lessee is entitled to deduct maintenance cost from the

rent according to previously stated Figh principle which states that contracts and conditions are permissible unless prohibited by a Shariah text. Along with what some Jurists approved of stipulating that the lessee to equip and furnish a building out of the specified rent in the contract and also stipulation of house refurbishment and a facility renovation by the lessee.

3- The lessor (the bank) may stipulate that an equipment lessee may pay an additional amount over the rent specified in the contract, to be expensed on maintenance. The former may inform the latter that he has leased the equipment to him for one thousand a year, provided that he pay 100 monthly on its maintenance as above stated that essence of contracts is properness and permissibility according to the opinion of some jurists.

4- The lessor (the bank) may stipulate that the lessee of an equipment to pay a specific rent amount monthly or annually, provided that lessor will deduct, for example, two months rent, to be allocated for maintenance costs.

He may inform the lessee that he has leased the equipment for one thousand per month and had deducted two months rent for maintenance.

5- The lessor (the bank) may stipulate that the lessee should undertake maintenance of the equipment against reduction of rent. The lessor may inform the lessee that he has leased the equipment to the lessee for one thousand, provided that in consideration of maintenance the rent will be reduced to nine hundred, or he has leased it for one thousand provided that it should be maintained against one hundred to be deducted out of it, because some jurists approve maintenance condition on the lessee, in addition to rent. It is also natural that the lessee observes in its lease agreement with the lessor (the bank), the requirements of maintenance works. Consequently the rent would be reduced which is a permissible action. As stated by Abu Hanifa, it is also permissible to increase the agreed upon rent in order to be expensed on maintenance works. This point should be considered upon agreement by parties of lease. In

case of stipulating a certain amount for maintenance to be paid by the lessee, the latter would endeavor to reduce the rent. All above stated cases are concurrent in purpose.

6- A group of Jurists, who were consulted by the bank for implementation of principles drawn by Figh Academy on maintenance contract, approved independent contracting with the lessee or any party for maintenance works, against a lump sum amount.

This proves that it may be stipulated in the contract because what is permissible indepently, may obviously be permitted successively.

Since maintenance contract, which is a contract of compensation, could be executed independently, and there is no gross ambiguity in maintenance works, so the stipulation for the lessee to perform it, in consideration of specific lump sum amount in Ijarah contract, is obviously permissible.

1-6-5 The Third Question:

Is it permissible from Shariah point of view to conclude an agreement between the lessor and lessee which oblige the lessee to insure the leased asset (Ayn) full insurance on his account?

Answer:

It is Shariah permissible for the lessor (the bank) to stipulate that equipment lessee to insure the equipment at Islamic insurance companies, as we previously stated that such insurance is based on the principle of instalments donation. The donor may stipulate to usufruct with others of what he donated, if it encompasses an attribute of entitlement.

1-7 Types of Ijarah according to the leased asset:

1-7-1 Ijarah of assets other than animals:

ccording to a general principle regarding Ijarah, any item which could be sold, could be a subject of Ijarah, because Ijarah is a sale of usufruct provided that the leased asset (Ayn) should not be exhausted in the utilization of usufruct. On the other hand, some items may be subject to Ijarah but not sale such as Ijarah of non enslaved person and Waqf Ijarah. Also usufruct should be meant for it self as per practice(43).

1-7-2 Ijarah of Houses and Buildings:

The lessee may usufruct of a house or a shop at his own discretion within customary limits, by himself or through others who should not bring forth extravagant harm, undermine the building by specific acts such as smithery. Ijarah of houses and shops include their annexes, even if they are not mentioned in the contract,

(43) Previous references.

because usufruct could not be realized without them[44]. The statement of usufruct in Ijarah of houses is to be evidenced by statement of Ijara duration only, because residing in a house is of unknown magnitude in itself, and could not be identified without duration.

The majority of jurists (Jomhor) see no maximum term for Ijarah duration since it is permissiple even if it lasted for a long period. However one opinion of AlShafia School consider that it is not permissible for more than one year and according to an other opinion it is not permissible for more than thirty years. Maliki School believes that Ijarah could be implemented in cash or deferred and its duration start from the date specified in the contract. In case no date is specified, it commences from the date of the contract[45]. In case Ijarah is implemented for duration, it should be known and it is not conditional to be following the

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(44)Al-Fatawah AlHindia 4/470, Kashf Al-Hagiag 2/34,35, Tayeen AlHagiag 5/113,114, AlBadia 4/182, Hashiat AlDosogi 4/44, AlMohazab 1/396, AlMoghni 6/51,53, and Kashaf AlGina 3/458.

(45)Majallat A-Ahkam Al-Adliah 485/486.

contract directly, in contrary to one of AlShafi opinions[46]. In case the lessor informs the lessee that he has leased him a house for a Dirham per month, the majority of jurists consider this as proper. Ijarah is binding in the first month, based on non limitation of the contract because it is known in the contract. However for following months the contract would be valid by the merit of involvement i.e. residing in the house, because the state of contract is unknown. If the lessee is involved in Ijarah by accessing property, it will be adequate based on first contract, but if he is not involved or he rescinded the contract after the first month, it would be considered as rescinded.

1-7-3 Lessor and Lessee Obligations in Ijarah of houses:

It is imperative for the lessor to enable the lessee of usufruct. The lessee is obliged to pay the rent at the time of enabling, even if usufruct is not satisfied. If the duration elapsed without enabling, the lessor would not be entitled for anything, however if a period of the contract elapsed before enablement, he should not oblige him to

(46) AlMohazab 1/396, AlMoghni 6/6.

pay a rent for the elapsed period before enablement. The lessor has the right to withhold the house in order to collect the rent stipulated to be paid expedietly. Enablement include non revert of the house to the lessor based on a condition in the contract[47]. Since it is permissible to usufruct the leased asset by the lessee himself or by others, he may sub-lease with the same rent with which he leased even or more by the same type with which he leased it or not. It is permissible to him to have increment for any funds he expensed on it of the same time (for example furnished houses) [48]. Provided that there is no condition which prohibits assigning the house to others, as aforementioned.

(47) AlHidaia 3/232, AlBadia 4/187, Sharh AlKharshi 7/42, Hashiat AlDosogi 4/44,45, Minhag AlTalibeen 3/8, Nihayat AlMohtag 5/295.

(48) Alhindia 4/425.

1-8 Ijarah being binding or not:

(A) A major principle of Ijarah contract according to majority of jurists is its binding nature. Consequently either party is not entitled to rescind the contract unilaterally, unless based on a cause for which appropriate contracts to be rescinded, such as occurrence of defect or the cease of the place of the utilization of usufruct[(49)]as deduced by the verse in the Holy Quran :

((ye who believe fulfil obligations)) [(50)].

(B) According to Hanafia, the lessor may rescind Ijarah for occurrence of emergency to lessee such as to lease a shop which got ablaze by fire or to be subject of theft. In this case usufruct is not realized due to such emergency that is based on analogy with the loss of leased asset (Ayn) [(51)]. Ibn Rushd considers this a permissible contract but not binding.

(C) For Ijarah to be considered binding, it should be void of any option. According to AlKasani, Ijarah is not to be executed

(49)Al-Moghni and AlSharh AlKabeer 6/20,Bidiat AlMogtahid 2/251.
(50)Surah Al-Maidah /1.
(51) AlMoghni 6/20-9, Bidiat AlMogtahid 2/251, Al-Hindiah 4/410

during the option period, because option hampers concluding the contract, as long as option is existing, because the holder of the option has the right to repulse the loss inflicted on himself.

(D) Ijarah may be concluded in multiple synonymous contracts, each year a contract, without each being a condition for the other. Accordingly only the first contract would be binding because it is consummated immediately, however the second and following contracts are supplementary contracts because they occurred before one year of their due date or even before three years. According to Hanafia, a supplementary contract is not binding and each party may rescind it at his discretion. This also applies on Ijara of Waqf contracts. The rent of the fist term may be very high and following Ijarah terms would be high, to the extent that if the lessee rescinds the contract, the Waqf would not be jeopardized[52].

(52) A-lFigh Ala Al-Mazahib Al-Arbaa 2/104.

1-8-1 Rescission of Ijarah due to defects:

The lessee may return back the leased asset due to a certain defect. Considering that the leased item in the hands of the lessee is the same as the sold item in the hands of the sellor. If it is permissible to return back a sold item due to a defect in the hands of the sellor, it is also permissible in case a defect occurred in the hands of the lessee[(53)]. Ibn Qudama views that: If a lessee leased an item and found an unknown defect to him, in that item, he may rescind the contract, as a generally accepted opinion[(54).]

However if the defect did not forfeit the intended usufruct of the contract, such as the collapse of part of the building without subjecting the house to natural hazards such as severe coolness or rain. An other example in this respect is discontinuation of irrigation water of a land but still it could be raised without water. All these cases does not necessitate rescission of contract.

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(53) Al-Mohazab 1/405.

(54) Al-Moghni 6/30, Al-Manar edition. Al-Insaf 6/66. Al-Sharh Al-Sagheer 4/49.

The crucial factor which necessitates rescission of a contract due to defects is up to the opinion of experts. If a defect occurred and cleared away immediately, it will not render the contract rescinded[(55)]. The taking hold of a leased asset (Ayn) does not forbid demanding rescission due to its defect. This is because Ijarah is different than sale in this respect, due to the fact that Ijarah is a sale of usufruct and usufruct occurs gradually, so each part of usufruct is contracted for with an independent contract. If a defect occurs in the leased asset, this is a defect which occurs after the contract and before taking hold. This necessitates option in sale of the asset (Ayn). The same is true in Ijarah, because there is no difference in meaning. In case the defect is cleared away before rescission i.e. defect cleared of the mean of transportation or the lessor took initiative to repair the building, the lessee would not be entitled to return back and would lose his right to require rescission, because no harm befallen on him[(56)]. The prerequisite of defect option, which is rescission or compensation, is applied only

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(55)Al-Insaf 6/66.

(56) Al-Badia 4/196, Al-Mohazab 1/405, Al-Dosogi Ala Al-Sharh Al-Kabeer 4/29, Al-Sharh Al-Sagheer 4/52.

in Ijarah of specific leased asset (Ayn) , however if Ijarah is concerning an asset (Ayn) described on liability, there would be no option in essence, but rather the lessor is obliged to replace the asset (Ayn) with a similar one in its description[57].

1-8-2 Ijarah rescission for an excuse:

As aforementioned Hanafia believe in rescinding Ijarah in case of occurrence of an excuse for one of the parties or the leased asset (Ayn) . The contract would not be binding and may be rescinded, since there is need for it in case of an excuse, because if the contract would binding in this case, then the excused party would bear damages for honoring a contract with which it is not bound. Hence rescission in reality is an abstention of being bound by damage, which the excused party is competent for it (Wilaya). In this respect the opinions of Maliki, Hanbali and Shafi is close to Hanafi School in the permissibility of rescission of contract due to an excuse, although Hanafi elaborated more on the subject. Maliki consider that if the leased asset (Ayn) or its usufruct is usurped or an unjust order which is beyond jurisprudence is inflicted to close

(57) Minhag Al-Talibeen, Al-Nawawi 67-68.

leased shops, the lessee has the right to rescind or sustain Ijarah[58]. The majority of jurists do not believe in rescission of Ijarah for an excuse, because Ijarah is one of the two types of sales, so the contract would be binding and since the contract was concluded by agreement of its parties, it would not be rescinded unless by their agreement. Shafi stated that no party is entitled to rescind Ijarah for an excuse, whether it is for usufruct of asset (Ayn) or liability, since the excuse would not render the leased asset defected[59].

According to Hanafi the excuse may be from the part of the lessee, for example if he is bankrupted or intending to travel or changes his occupation or craft, such as from farming to trading. The bankrupt would not benefit from using the shop for trading, and if he is compelled to engage in trading this will render him damaged. Also if the contract is sustained while there is a necessity for the lessee to travel to an other place, this will bring about damage to him. The excuse may be on the side of the lessor, such that if he is

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(58) Al-Sharh Al-Sagheer 4/51, Darul Maarif edition.

(59) Minhag Al-Talibeen and Hashiat Al-Galiobi 3/8, Al-Mohazab 405.

grossly indebted and no way to settle such debts without selling the leased asset (Ayn) such as means of transport, real estate etc. . . In this case he has the right to rescind Ijarah.

1-8-3 Dependence of rescission on judiciary:

There is a trend in Figh which considers rescission to be dependent on consent or judgment by judiciary, due to the fact that this option had been established after consummation of contract, which is similar to returning back an asset for excuse after possession. According to an other trend in Figh is that if the excuse is obvious so no need for judiciary, but if it is invisible such as debt, judiciary is mandatory as advocated by AlKasani and others. In case of difference between parties, Ijarah would be rescinded by judiciary. If the lessee requested rescission before usufruct, the judge would rescind the contract, without harm on the lessee. However if the lessee usufruct of the leased asset, the lessor has the right to take the specified rent, as a favor from him, because the leased asset is intended for usufruct. Rescission would not be retroactively[(60).]

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(60) Al-Dor Al-Mokhtar 2/302,303.

1-9 Provisions of proper Ijarah :

If Ijarah is proper it would be governed by its proper provision which is establishing possession of the lessee of its usufruct and the specified rent to the lessor. There are consequential[61]provisions such as commitment of the lessor to deliver the leased asset (Ayn) to the lessee and enable him to usufruct of it and that the lessee has to preserve it.

(61)Al-Badia 4/201.

1-10 Rules of invalid Ijarah:

Consensus of Muslim jurists (Jamhoor) does not differentiate between invalid and null (void) contract. They consider contract incorrect if it didn't fulfill requirements of Shariah, as it is prohibited. Prohibition necessitates non-existence of contract from Shariah point of view, whether; prohibition is due to deficiency in the principal contract or due to a description inherent or emergent to it.

Prohibition results in no effect, and the use by the lessor is not permissible, and does not result in the identified rent, but he shall pay the equal rent whatsoever if he receives the subject of the contract or used the usufruct, or time has elapsed for the use of the asset because lease is like sale and usufruct is just like an asset, and the invalid sale is like the correct one in terms of stability of the exchanged item, it is so in Ijarah and it is so according to opinion of Shafie(62).

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(62) Nihait Al-Muhtaj 5/264, Minhaj Al-Talibeen and Hashiat Al-Qaliobi 3/86, and Al-Muhazab 1/399.

1/11 Entitlement in lease:

Jurists have differed over the entitlement of the leased asset if some one other than the lessor claimed its ownership. Some of them opine that lease is invalid; others see that it is restricted to lease of the entitled. They differed over who is entitled to the rent.

1/12 Termination of lease:

Jurists have agreed that Ijarah terminates either by the end of its term, or by rescission of contract (Iqala) or by total destruction of the particular subject of the contract.

1/12/1 end of term:

If term of Ijarah is specified, and the term expired, Ijarah winds up. Some times there is a reason to extend the period of Ijarah e.g. Ijarah is on an artificial land where crops are not yet collected, or a vessel in the sea, or a plane in the air and the term expired before it landed down(63).

1/12/2 Termination of Ijarah due to rescission of the transaction (Iqala):

As rescission of the contract (Iqala) is permissible according to prophet's saying- Peace and prayers be upon him –:" that who rescinds the sale contract (Iqala) because he feels repentant, Allah will forgive him in doomsday". Narrated by Abu Daood, Ibn Majah, and Al-Hakim from Hadith Abu Horirah, it is also permissible in lease because lease represents a sale of usufructs.

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(63) Al-Mohazab 1403/ 404, Al-Fatawa Al-Hindiah 4/416, Al-Ikhtiar 2/58, Al-Halabi edition.

1/12/3 Termination of Ijarah due to total destruction of the leased asset:

Lease contract is cancelled due to total destruction of the leased asset to the extent that no benefits are drawn from it such as: the vessel if destroyed entirely and became sheets of timber, and the house if destroyed and turned into rubble, to this extent it is agreed upon, but if the benefit expired there seems to be some difference[(64)].

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(64) Al-Mughnie 6/76 Almanar edition, 1347H, al-Insaf 6/6/62, al-Badiae 4/196 onward, Al-Sharh Al-Saqeer 4/49 and 50, Hashiat Al-sas Dar al-Marif edition, Minhaj Al-Talibeen 3/77, Al-Mughni 6/25, 27 Al-Manar edition 347H.

1-13 Group Shariah opinion (Fatwa) on re-lease[65]:

First: The lessee owns the usufruct, and in principle any one who owned the usufruct is able to benefit from it for himself and for others, so it is permissible for the lessee to re-hire or re-lease the leased asset.

Second: There is no logic behind the owner of the lease asset to stipulate that the lessee should use the usufruct himself, unless damage occurs to the leased asset.

Third: It is permissible to re-hire the leased asset for similar, lower or higher pay whether re-hiring takes place after or before the first lessor receives the asset.

Fourth: It is permissible for some one who rented the service for another to re-hire it to some one else for the same, lower or higher pay as lessor of the worker's service is entitled to its usufruct so he may transfer it to another.

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(65) The second Figh symposium of the Kuwait finance House, item 3.

1/13/1 Permission to re-lease (Sublease):

To explain the Shariah opinion (Fatwa) as stated in the second paragraph of the third Figh Fatwa of Kuwait Finance House concerning re-hire (re-leasing) which reads: "no logic behind the owner of the asset to stipulate that the lessor shall use or receive the usufruct himself, unless some damage occurs to the asset". The problem here is that the stipulation by the owner for the lessor to use the usufruct himself did not allow what is prohibited or prohibits what is permissible", and the lessor has accepted it, so how should there be no logic in it?

The said Fatwa is the one stated by the consensus of Muslim jurists (Jamhoor), and comes in the context of opinions of schools of Figh and their approved reference books (e.g. Al-Insaf by al-Mirdawi 6/49, Al-Mughni by Ibn Ghudamah 5/477, Mughni al-Muhtaj Al-Shirbinie 2/350, Hashiat Ibn Abideen 6/28).

The problem is that this stipulation restricts ownership of usufruct, it is similar to ownership of the asset (Ayn) just like some one who sold a commodity, to another and said: "Do not sell it to any one else", hence the usufruct is now owned by the lessor, and

restriction violates principle of ownership which in turn violates requirements of the contract except in case of damage.

1/13/2 Another Shariah opinion (Fatwa) by Al-baraka symposia stated as follow:

Question[66]:

Is it permissible to conclude an agreement to purchase equipment from a company or real estate and lease it again to the same seller?

Answer:

If sale agreement is completed first and then an agreement of Ijarah is concluded, the transaction is permissible.

1/13/3 Another Fatwa was issued which reads:

Question[67]:

Is it permissible to lease some thing for a fixed rent and then lease it to other party for a higher rate?

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(66) Resolutions and Recommendations of Al-Baraka symposia, first symposium, Fatwa No.14.

(67) Resolutions and Recommendations of Al-Baraka symposia, Second symposium, Fatwa No.4.

If it is permissible, then is it allowed to bring in a third person to share the first contract so that he becomes a partner in the difference of lease by selling his share of the usufruct ownership which entered into the guarantee of the first lessor, irrespective of whether that sale price is similar to or less or greater than the rent paid.?

It is permissible to lease a thing for a fixed amount and then lease it again to other party for similar, higher or lower price unless prohibited by the first lessee or customary practice (Uruf).

Likewise this partnership is permissible if it is made for a similar, higher or lower amount than the amount paid by the first lease holder, but if he loses his right of usufruct after a later rent, then it is no longer permissible for him to exercise his right of disposal in what he no longer owns which became a debt due to him with others.

Thus, Hanbali school of Figh stated a Shariah opinion which is not ratified by other jurists (Al-Mughni 77) to which Ibn Ghudammah referred: "it is permissible that a condition becomes correct, which is one face of Al-Shafie companions, as lessor owns usufructs for the lessee side, so he will not own any thing that he does not like to

give, and as he might have an objective behind allocating the usufruct to him, on the other side the condition is abrogated because it contradicts contract requirements as it is bound by usufruct ownership".

1/14 Lease of the leased asset:

This matter is called (lease of the leased asset). It is not meant sublease by using the term (lease of the leased asset) as this occurs from the side of the first lessor, but here lease is exercised by the owner to a second lessor after leasing the asset to the first lessor.. Jurists have conducted researches covering this issue, and their opinions were summed up as follow:

If the owner rented the leased asset to a party other than the present lessor, we check to see if the term of the second lease exceeds the first lease term after the expiry of the first lease, the second lessor shall use the asset for the remaining period, but if the second lease term has expired with or during the expiry of the first lease term, then the second Ijarah (lease) contract is cancelled.

The solution by jurists to the problem of leasing the leased asset was an attempt to compromise the two contracts which are

concluded for one subject so as to directly benefit from the usufructs of the asset, but the case here aims at investment by sale of usufructs and introduction of intermediary as a lessor between the owner / lessee and the actual lessor, so that the intermediary lessor obliges to pay the rent which may be advanced, or deferred but his liability is stronger than the liability of the lessor who is the beneficiary of the asset.

In principle, mediation between the beneficiary lessee and the lessor shall take place in a chronological order where the beneficiary lessee undertakes to lease so that he possesses the usufructs as per the lease contract with the owner then the intermediate lessor is required to enter between them.

The normal situation here is cancellation of Ijarah contract between the beneficiary lessee and the owner (lessor, then Ijarah contract is concluded between the owner of the asset and the intermediate lessee, and conclusion of a second contract between the intermediate lessor and the beneficiary lessee.

No doubt, there are some obstacles and precautions which obstruct such long ways, the beneficiary lessee fears change of terms of his

present contract and unwillingness by the intermediate lessee to continue lease instead of a new potential lessee.

The alternative for the cancellation of the contract is conclusion of a new lease (Ijarah) contract and conclusion by the intermediary lessee of lease contract with the beneficiary as follows:

The owner concludes lease (Ijarah) contract with the intermediate lessee is tied up with the approval of the current lessee (the beneficiary of the asset usufruct) with a promise by the intermediary lessee to continue the lease (Ijara) contract signed between him and the present lessee. This transaction is carried out through a notice sent by the owner and the intermediary lessee informing him of the intermediation made by the intermediary lessee and his promise to let the beneficiary continue benefiting of the leased asset according to the same previous specifications, and concluding the notice that the elapse of a period of ( ) days without receiving a reply from the present lessee is considered an approval.

This takes place by including an annex of the lease assignment agreement, in the documents, in terms of a message sent by the owner and the intermediary lessee to the present lessee which does

not include enabling the present lessee to reject, thus it doe not require from him an explicit or implicit approval as he is considered granting approval within a specific period.

The lease assignment, if takes place, without the approval of the present lessee (as if the disposition by the owner concerning the leased asset is actually his right to transfer it to the intermediary lessee whether the present lessee accepts or rejects so) it is not permissible from Shariah point of view because usufructs according to the first lease contract are owned by the current lessee and it is not permissible to involve the current lessee into a new relation with the intermediate lessee without his consent. According to jurists terminology the asset after leasing becomes without usufruct as the usufruct is now owned by the lessee.

2- Second : Ijarah Wa Iqtina:

To know the Figh opinion with regard to Ijarah Wa Iqtina', we shall give a brief introduction to this method, its general features and famous types.

2/1 Features of financial lease:

Financial lease contract requires full amortization of the asset value throughout the contract term, hence it is also called capital lease which means that total contracted rental payments shall cover the entire cost of the asset and produce a reasonable return into the lessor's invested capital.

The lessor bears all expenses related to the use, maintenance and ownership of the asset (e.g. real estate taxes and insurance premiums).

The financial lease contract is irrevocable, but if the lessor is willing to terminate the contract he shall repay all the remaining rental payments at once.

Willingness to enabling possessing the asset after end of lease term during which the entire value of leased asset is amortized in addition to realization of reasonable return to the lessor, which means that the investment objective of the lessor is realized" therefore contracts include an option for the lessor to renew the lease at a lower rent or to purchase furniture for an agreed upon lower price or even without pay, so lease transaction ends by the

lessee owning what he had leased, so it is sometimes called lease ending into ownership – Ijarah Muntahia Bittamleek .

2/2 Types of lease ending into ownership - – Ijarah Muntahia Bittamleek-

There are many types of lease ending into ownership - – Ijarah Muntahia Bittamleek – some of which are considered a result of applications, which are categorized as of major and sub-types. We are interested in the types which include clear differences that require provision of Shariah rulings (Fatwa) accordingly, considering that they are all intended to transfer ownership of the leased asset to the lessee otherwise it should be categorized as operational lease contract.

2/2/1 First – Financial or capital lease:

It is the major type from which the other kinds have come out, it carries all features and traits previously referred to, and on which data of this research is based.

This type of lease is divided according to the contracting parties as follows:

2/2/1/1 Direct leasing:

It is a contract which allows the leasing company to acquire a new asset not owned by it before; in this case the lessor is the company

which manufactured the asset e.g. planes manufacturing company or a computer producing company.

The lessee company determines the required asset and negotiate with the producing company with respect to price and date of delivery, then the company makes arrangements with the financier or the lease company specialized in purchasing the equipment or fittings from the manufacturer, at the same time the lessor (lease company) purchases the equipment and the lessee company simultaneously executes the lease contract with the financing company.

2/2/1/2 Leveraged leasing:

This type of lease was created and developed to finance high spending assets.

The leveraged financing is distinguished by existence of three parties to the contract instead of two parties as usual. These three parties are:

Lessee , lessor who is also the owner, and the financier which is a commercial or Islamic bank or financing entity or a specialized lease company. The difference is in the role of the lessor who

purchases the required asset on a partial finance basis (e.g. 30%) and finances the remaining part (70%) by a financier for long term finance through a financier, by hypothecating the asset to the financier and allocating rental payments to repay the amount of funding.

2-2-2 – Sale and lease back:

This type of lease is made when the enterprise owns land, real estate or any other asset, sells them to a financing entity and concludes a contract with it to lease the asset which is sold to it to continue using it.

The financing entity (e.g. the Islamic bank) pays the market rate of the asset to the selling (lesse) company. However, total rent payments paid by the lessee (selling) company shall cover the price paid for the asset in addition to a reasonable return for the lessor.

The most distinguishing feature of this finance is that the selling company receives a high cash flow equivalent to the price of the sold item while retaining the asset for use, the matter that provides the company with the liquidity required for other purposes.

2/2/3 Third: Gradual sale and partner's right to the lease:

This method is a prophet of a combination of installments sale and the operational lease, where the owner (lessor) i.e. the Islamic bank, agrees with the lessee to sell it the owned asset according to method of sale in installments by a particular advance payment and payment of the residual asset in installments spread over the remaining period.

Hence, the seller (the bank) and the buyer become partners in the equity of the asset on pro rata basis, and in order to enable the partner use the asset, the bank lets its shares in the asset (real estate for example) pursuant to an operational lease contract while the buyer continues to pay installments of sale price, its share in the asset increases gradually, thus he shall pay a lesser rent in return for the use of the partner's shares. When ownership is entirely transferred by completion of payment of sale installments the partner halts payment of rent because the asset is now completely owned by him.

This method is different from diminishing partnership (Musharaka) as it allows the partner (The client of the financier) to utilize the

jointly owned asset, whereas diminishing Musharaka may take place with the intention of letting to others or manufacturing products to be sold to others, and it doe not involve in its very nature or concept lease or lease to the partner in particular[(68)].

2/3 The outcome of lease ending into ownership - Ijarah Muntahia Bittamleek[(69)]:

Forms of lease ending with ownership may be shown on the light of the explanation made by secular law specialists for the rules of fiduciary sale and the statements of secular laws as follow:

First: Lease ending with ownership has many forms revolve around what the contracting parties agreed and their intentions of this contracting i.e. lease, sale, or lease and promise to sell, and the rental they determined in case of Ijarah, and price in case of sale, and the time of ownership transfer. Following are some types of the lease:

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(68) Meeting of investment managers (Ijarah), a paper presented by Jordan Islamic Bank.

(69) A paper presented by Jordan Islamic Bank, Meeting of investment managers (Ijarah) – Amman.

2/3/1 First type:

The contract shall be drafted as a contract of lease ending with ownership of leased asset - Ijarah Muntahia Bittamleek- if the lessee wishes so – against a price represented by the amounts actually paid as rental installments for this leased asset during the specific period, and the lessee becomes owner (i.e. buyer) of the leased asset automatically once the last premium is paid, without conclusion of a new contract. In this form of lease, the price of sold item is the rental installments which are agreed to be paid during a specific lease term, without any payment by the lessee, and the ownership automatically transfers upon the payment of the last installment.

2/3/2 The second type of lease:

The contract is drafted as a lease contract which enables the lessee to use the leased asset in return for a specific rent and a particular term, provided that the lessee shall be entitled to own the leased asset by the end of lease term for payment of a specific amount.

This amount is either a token price which is not equivalent to the price of the lease asset at sale, or an actual price.

2/3/3 The third type of lease:

The contract is drafted as a lease (Ijarah) contract according to the second type, but at the end of lease period the lessee shall be entitled to either of the following matters:

Possessing the leased asset in return for a price in determination of which shall be considered the amounts he had paid as rental installments, extending the lease (Ijarah) term for another term or return the leased asset to the entity owning it.

2/4 Demonstration of the Sharih origins of Ijarah Wa Iqtina (Lease ending into ownership[70]:

We shall briefly refer to some of the important Figh issues which does not cover this issue, i.e it is permissible to contract on a particular asset owned by the lessor or the seller, and no objection for one transaction to embody two contracts of financial commutative contracts, particularly lease and Ijarah, and it is permissible that the contract be connected to a condition or more which are required by the contract and which affirms its content, or satisfies a legal benefit to either of the contracting parties, and does neither violate the essence of the contract, nor contradicts a wording of Hadith or Quraan, and shall not lead to prohibited acts or Gharar or that the condition is impossible.

(70) Magazine of Islamic Figh Academy, the special session.

Following is the demonstration of the Sharih origin of the forms of:" Lease ending with ownership contract" on the light of the conditions included therein along with their Shariah rulings:

2/4/1 demonstration of the Sharih adaptation of the first type:

In this type, the ownership transfers to the lessee once the last lease installment is paid – automatically – without a need for concluding a new contract and without price, except the amounts paid as lease installments for this leased commodity during the particular period, which in fact represents the price of this commodity.

Possessing the leased item is pending for the payment of all such lease installments so is it a suspended sale and its price is the installments which the lessee paid? What obstructs this is that the installments were paid as rent for the leased asset, so how can it change to a price for the leased asset by the end of lease term.

It is known that the price is either immediate or deferred at completion of sale contact, what is received here under Ijarah contract is the price of the usufruct received by the lessee, so it was adapted or demonstrated under the contract as rent, and its transfer to a price for the leased asset according to a later contract, does not conform with the rules which set for each contract its rulings and effects at contracting. So demonstrating – from Shariah point of view – this contract as a sale contract with an installment price

suffers much difficulties in Figh which makes it impossible to state so.

Some researchers stated that it is possible to draft an alternative to the lease contract ending with ownership.. It is a sale contract which stipulates that it is not permissible for the buyer to dispose the sold item by any type of disposition – by commutation or donation unless price is paid fully, otherwise the contract is cancelled together with the payable rental installments – which are the installment payments of the leased asset, if he paid installments in full then he is entitled to dispose it. However if he paid installments in the previous period, and refused to pay the remaining specified premiums, this should be solved by deducting the actual rental value of the said installments which he paid during the previous period, beside paying reasonable consideration for the damages incurred by the seller due to this violation as a penalty clause.

Basing this demonstration of Shariah origins / adaptation on prohibiting the lessee's disposition denies the essence of this method which is enabling the lessor to utilize or benefit from asset

for rental, even if it is not equivalent to the equal pay. So how can he be paid for what is legally permissible for him as per the contract.

2/4/2 Selected demonstration of Shariah origins for the first type of Ijarah:

The appropriate demonstration of Shariah origins for this case is by making Hibah (gift) contract bound with the condition of repayment of all installments agreed to be paid during this period i.e. Hibah shall be tied up with a condition i.e. "payment of all rental installments during the specified period, and not violating its conditions". The wording shall be as follow: "If you pay all the agreed premiums during this agreed period, I give you this commodity as a gift and the other party accepted "then gift "Hibah" contract becomes a contract tied up with a condition, which is governed by rules controlling contracts tied up with conditions in Islamic Figh. However, jurists differed over tying up Hibah on a condition in Figh, and were grouped into two opinions:

2/4/2/1 The first opinion[71]:

It is not sound to tie it on a condition (opinion of Hanfie, Shafie, Hanbali, Zaidi and Imamiah jurists), because effects of ownership contracts appear immediately, and hence tying it up on a condition violates the nature and essence of the contract, so it is not sound to tie it to a condition as this implies gambling, and Hibah belongs to these contracts, as it requires immediate possession, and it is not based on preferring or selecting, and tying up contradicts this situation as it ties up possession on likely occurrence of an event in the future, the matter to which it is tied up might occur and might not occur which contradicts the nature of such contracts that demands immediate possession in addition to the resulting Gharar.

2/4/2/2 The second opinion:

It is the preponderant opinion – permissibility of tying it up on a condition (an opinion of Hanafi jurists), which permitted tying it up on the appropriate or accustomed condition, which is the opinion of Mlaiki jurists[72]and Abadia jurists.

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(71) Mughni Al-Muhtaj 2/369 and 404, Kashaf Al-Ghinaa 2/374, Al-Taj Al-Mozahab: 2/30, Al-Ekhtiar by Almosily 2/116

(72) Al-ElTizamat by Al-Hatab: 1/180 and 211, Sharh Al-Niel 6 /10, to read the theory of condition in Islamic Figh, and Hassan Al-Shazali p.135.

2/4/2/3 The use of the promise method:

In addition to use of (Tying up Hibah to condition) which is stronger because it is a contract, the lessor may promise the lessee to donate him the commodity by the end of the specified contract term, and after payment of all rental payment installments agreed on during this period. The jurists have two different opinions regarding whether promise is binding or not, where consensus of jurists (Jamhoor) opine that it is not binding.

Maliki jurists, according to an opinion of them, the promise is binding if the promissee entered into an obligation due to this promise which is the opinion of Malik, Ibn Al-Qasim and Sahnoon.

2-4-2 Demonstration of Shariah origins of the type of Ijarah for which a token price is determined:

This contract includes the following:

* Ijarah contract – an immediate contract, in which rental and lease term are specified, so if the lease term expired or if the lessee declined to pay the agreed rental installments Ijrarah contract terminates.

* Sale contract to be concluded by the end of Ijarah term – if the lessee requested so – and paid the agreed upon price (The token price), the ruling of this type shall accompany the ruling of the second type as there is no any significant difference between them, because price amount is not restricted in the case of bargaining sale. It may be equal or not equal to the price, and mutual agreement between both parties over price is quite enough.

2/4/3 the type of Ijarah in which an actual price is determined for the sold item:

This contract has also included both Ijarah contract and sale contract, it is an immediate lease contract connected to a canceling or terminating condition.. and a sale contract is tied up with a

condition of repayment of rental installments during the specified term of Ijarah contract.

In this sale, an actual price of the sold item is specified to be paid by the lessee (the buyer) by the end of the lease term, hence the leased commodity becomes sold and owned by the lessee (the buyer) in terms of its benefit and asset, and the lessee has the right of the owner over it, like utilizing and disposing it off according to legal Shariah dispositions after paying the agreed on price.

However, demonstration of Shariah origins of this agreement shows that it is a lease contract in its onset which is governed by all provisions & rules of Ijarah contract and its and Shariah legal effects.

Thus, after the end of Ijarah contract starts the sale contract which is tied up with the realization of the condition related to Ijarah contract, which here in this type of Ijarah does not require any new text (wording) as long as it was executed by a party saying: " I sold" and the other saying: "I accepted the sale" and any similar wording which proves true sale, and as long as the text (wording) does not indicate" a promise to sell" or " a promise to purchase" or a promise for both sale and purchase by both parties.

2/4/4 The form (type) in which Ijarah is connected to a promise to purchase:

The wording in both of the two above mentioned types (forms) implied an absolute sale wording "I sold or bought", however Ijarah may be tied up to a promise to sell or purchase, or promise by both transactions (exchanged promise):

Here it is a bit different that in this type, Ijarah contract is connected/ tied up to a promise to sell, or purchase or promise of both transactions by both parties.

In banking practices, it is opted to deal according to a Maliki opinion, i.e. the promise is binding (obligatory) if the promissee entered into an obligation due to this promise hence according this opinion it should be followed and fulfilled accordingly.

Also, the resolution of the Islamic Figh Academy which states that the promise should be unilaterally binding shall be observed, from the side of either lessee or lessor, but not both, so as to refrain from resembling the contract.

2/4/5 The type of Ijarah which includes a promise by the lessor to the lessee to opt to sale, or extend lease or withdraw the leased asset by the end of Ijarah (lease) term:

This type / format is an Ijarah contract connected to a promise to sell for specific price or as per the market rate or Ijarah term, or return the commodity to the lessor. This disposition is not prohibited as it is equivalent to the type of Ijarah tied up (connected) with a promise to sell for an actual price.. But here it becomes more flexible for the lessee, as it empowers him to select between three choices by the end of Ijarah term: purchase the commodity, extend Ijarah (lease) term, or return the commodity to the owner.

2/4/6 Other types of Shariah adaptations:

Thus, during deliberations of the Islamic Figh Academy to issue its resolution in this respect, other demonstrations of Shariah origins were tackled:

These deliberations were summed up that, this contract which is called lease ending with ownership – Ijarah Muntahia Bi Tamleek – in its current legal and customary form does not look like permissible contracts and shall not be permissible according to sayings of some jurists, unless it takes the form of any of the following modes:

First: It shall be an actual lease accompanied with option sale for those who permit the long term delayed option provided that each of them should have a specified position according to the opinion of many jurists like Shafie, Hanablie and Maliki.

Second: a promise to sell later after lease (Ijarah).

This form (type) is weak as it is not supported by any party except with regard to obligation of fulfillment of promise, however since it came after the contract it is less than the condition of sale stated in the contract which was demonstrated and adapted as a promise made for a particular reason.

Third: To sell him the item provided that the sale shall not be executed unless the price is paid, so the sale becomes tied up to the last payment of price, and according to Al-Zarghani this format (type) of lease is permissible and upheld by Al-Banani, while selecting the word "shall not be executed" instead of "the contract shall not be made" so that the asset is just like it is withheld for the price, i.e. the sale is conducted but not executed, and if he paid some of the price, and the seller demanded to return the commodity he shall pay back the price.

Fourth:

To sell him in an absolute sale, provided that he shall not dispose off the sold item unless he pays the price, so he shall be committed to it, and it becomes like the hypothecated item which is not allowed to be disposed of because it is just like the mortgage if payment of price is not specified.

2/4/7 Shariah adaptability based on separation of the usufruct and the asset:

Fifth: A promise of gift "Hibah" annexed to the lease contract and based on a reason. It is the most permissible and accurate formula(73).

A researcher has developed another envision for Shariah adaptability of lease ending with ownership – Musharakah Muntahia Bi Al-Tamleek -or presentation of a useful Shariah alternative i.e. the assets are composed of the corporeal property (the asset) and the usufructs. Separation of usufruct and asset is an existing practice in Figh. This is in case of guardianship in usufructs and endowment (Waqf).

Here we may say that we can sell the usufruct from the beginning for a price which may be parallel to the price of both the usufruct and the asset, as said by consensus of jurists that the usufructs represent the very essence of the assets, and in fact assets are owned by Allah, so the sale of usufructs is in reality a sale of the entire asset including its usufructs. To reach the concept envisaged

(73) Summary of discussions, presented by Sheikh Abdullah Bin Baia', bulleting of Islamic Figh Academy, part 5, 2674.

by banks that the buyer of usufructs dispose of his usufructs as an owner. However, the asset remains under the possession of the owner, then the asset is annexed to the usufruct after payment of usufruct price in installments spread over specific term, and if payment is made the asset shall be annexed to usufructs. Hence, we could have reached the ultimate end, and this concept may lead us to avoid problems of conditions and violations of contracts[74].

(74) Magazine of the Islamic Figh Academy, part 5/ 2732 – Discussion of Mohammad Rida Al-Ani

2/5 Transfer of ownership in lease ending into ownership:

No objection to state in Ijarah contract[75] that the ownership of leased asset shall be transferred after payment of rental installments to the lessee, however a lease contract shall be concluded in due time, i.e. upon payment of all installments and this contract can not be concluded on the onset of lease as the sale contract can not be tied up to the future, and no objection to make a promise to sell in due time.

Also ownership may be transferred by way of gift (Hibah) at due time also, but Hibah may be tied up to payment of all installments, hence the asset is automatically transferred once payment is made, because Hibah accepts being tied up with an event, if this event occurred then Hibah takes place.

(75) Shariah replies of banking applications, part 3, No. 156

2-6 Estimation of Rent in Ijarah Wa Iqtina:

A technical researcher has noticed during the discussion of Figh Academy for the subject[76] that although he considers all payments as rent, although it is actually part of the price. Consequently upon rescission it should be calculated or deducted from that rent. It should be stated that part of it is a consideration of usufruct and the other part should be returned to its owner, otherwise it would be taking something illegally.

He pointed out that the best reasonable method to be applied in Islamic banks is that a lessee should be considered as a lessee who is promised of gradual ownership i.e. every year he holds ownership proportionate to what he paid, the equivalent of rent after deduction of usufruct consideration out of it. Accordingly the remaining residual would be part of the price. As such the lessee would be entitled for common shares in the property in proportion to the paid price. In case the contract is rescinded in any stage, he will be entitled to ownership proportionate to the share which he already paid, and rights to be settled accordingly. As for

(76) Figh Academy magazine 5/2676, discussion by Dr. Sami Hommod.

consequences of ownership such as depreciation, tax and maintenance, it would be equivalent to the share of ownership at the time of its occurrence.

One of the members of the Academy, in regard to the rent as being more than the estimated equivalent price, opined that it is related to estimated equivalent price. Hence if it is revoked, we revert to the estimated equivalent price and then any increment would not be a right entitled for the owner, because he will be disposed of consequences by certain conditions. These conditions if they don't contradict the subject matter of the contract, it is then approved, otherwise, it would be rejected and the contract itself would continue as sound and proper.

2-6-1 Proposal for research:

These are examples of difference between rent and estimated equivalent price(77), and damages inflicted on the lessee if the leased asset (Ayn) was not possessed.

It is apparent to me that above mentioned opinions in (rent) researches, regarding permissibility of its repetition by different magnitudes according to certain circumstances such as the period, place, quantity of work, the worker, the distance and quantity of carriage etc. . This could be a reasonable basis for using the principle of repetition in the (period of) Ijara :

- In case Ijara extended to include the whole agreed upon contract period, the rent would be as such (considering agreed upon distribution of the total price, leased asset (Ayn) cost and profit on periodical terms) because since the lessee has owned the leased asset (Ayn) he would not bother for the distribution mechanism, as all are entitled.

(77) Figh Academy magazine 5/2678, discussion by Shiekh Mohammad AlMokhtar AlSalami.

- If the period of Ijara is terminated before its due date for any reason (for a Shariah accepted excuse for rescission, or by mutual consent or by violation of Ijara conditions) the Ijara would be as such (considering a just estimation of rent within the limit of estimated equivalent price) . Consequently the lessee will not pay more than the equivalent of usufruct during the period of usufruct. This is just a proposal for more research.

2-7 Some examples of Shariah observations:

In relation to some conventional Ijara Wa AlEqtina contracts:

2-7-1 Conventional contracts of Ijara Wa AlEqtina were deduced from various provisions of Ijara such as determination of rent and incurrence of the owner (the lessor) of the liability arising from the contract such as his obligation towards maintenance and all burdens of the ownership. It also included many points which need to be clarified to avert ambiguity and aleatory of contracts (Gharar).

Such deviations from Shariah guidelines disqualified these forms of Ijara from their underlying intentions and transformed them to modes comparable to usurious (Riba) modes, because they award the owner returns without shouldering the guarantee.

2-7-2 The contract should better be denominated as (Ijara with purchase promise) instead of (Ijara with purchase option). This is because option in Islamic Figh gives the option holder freedom of choice either to purchase or not. Accordingly it is not permissible to seize the insurance amount paid at the start of lease contract if he refused to purchase. This is due to the fact that the advance amount is considered in effect as trust which is permitted to dispose of, so it should be returned to him as per his request.

The cash amount paid at the time of contracting, in order to confirm seriousness of the client to purchase the property, is contradicting with the principle of option in Figh. This contradiction would be cleared if we use the mode of purchase promise instead of purchase option. In case of purchase promise the cash amount may be requested from the promisor to confirm his seriousness. This amount is considered in effect as a trust which is permitted to dispose of, and so it is not part of the price. Also this amount would be guaranteed by the party holding its right of gain and loss. In case the client fails to honor his promise, the cash amount may be confiscated if it is stipulated in the contract, which

should only be deducted in proportionate to actual damage realized due to forbearance.

In case the property was sold with less than the original invested amount, it is permissible to deduct the equivalent of the realized loss from the deposited cash amount. However, no amount should be deducted if the total original invested amount is realized upon the sale of property.

2-7-3 Some contracts state that in case the lessee exercised the purchase option, the lessor would convey the property ownership to him, without mentioning the extent of the lessee right in non exercising this option. If he is not entitled for the latter, this is not an option but rather obligatory. On the other hand, if he has the right to reject purchase, the amount which should be paid by him under the price or purchase was not determined. Also it is not stated whether this is considered the whole price or part of it.

It should also be observed as previously mentioned, that it is reasonable to link the lease contract with a promise of obligatory purchase or sale and not mere purchase option.

4- In some contracts the term of additional rent is used, without specifying the details of this rent, because it has not been determined on entering the contract. This contradicts with the properness of compensation (Moawada) contracts including Ijara, wherein the rent should be fixed and specified in magnitude or by setting a standard which could be applied at the time of entering the contract to evade any further dispute.

5- Sometimes it is stated that the lessee should pay immediately on execution of Ijara contract, the first monthly installment of the installments spread on the contract period.

This is absolutely rejected unless the payment is correlated with entitlement of installment with the delivery of the leased asset (Ayn) after the lessor has already owned it. However, if the leased asset (Ayn) was not purchased at the time of the contract execution, or it has been purchased but not yet received by the lessor who is leasing it to the lessee, the lessor would not be entitled for the rent of that period until the asset is delivered or the lessee is enabled to receive it.

6- Some contracts include clear statement that the lessee should not expect the lessor to incur any of the responsibilities often incurred by the owner (the lessor), whether these responsibilities are related to maintenance or repair or providing any service to the property. This principle is not Shariah accepted, because Ijara is related to usufruct in consideration of rent. The usufruct should be existing and capable of utilization throughout the Ijara contract. This liability of the lessor should not be disavowed and overburdened on the lessee, because entitlement of rent is arising from utilizing usufruct.

The lessee may bear the liabilities arising from operation and periodical maintenance, because these are consequences of use, which is permissible. These items are treated as if they are part of the rent which is obligated on the lessee.

7- The lessee is obligated to pay the lessor an amount called (Option Price). Some contracts do not include details about the treatment of such an amount. If the lessee did not exercise the purchase option, is such an amount would be returned to him or not?

In fact an option should be without any consideration, because it is a wish and desire and so there is no right to take a consideration for it. This is not contradictory with the obligation to purchase based on obligatory promise, whereas the lessor is entitled for compensation for breaching promise.

8- In case the lessee delayed in payment of the rent, the right would be given to the lessor to claim from the lessee the standard Adm. Charges. The meaning of standard here probably include consideration for delay prevailing in the market. Hence these charges include delay charges in addition to administrative charges. According to Shariah principles the party causing charges (here the lessee) should bear actual administrative charges in order to collect the dues, without any increments for delay. It may be stated that in case of delay without a Shariah

accepted excuse (i.e. in case of procrastination), he should be committed to pay an amount or specific rate to a charity (donation fund) to cater for lenience in paying dues. This should not be considered as part of the lessor resources.

9- In some contracts it is stated that the lessee would bear all taxes related to ownership of the property. This is impermissible in Shariah. All charges of ownership should be borne by the owner, while other taxes (other than property tax) to be borne according to the verdict of the authority which imposed them or according to agreement of the concerned parties.

10- Some contracts accord to the lessee the right to terminate the contract provided that he pays all amounts which become due later. This action is not Shariah compatible and it is comparable to taking gains unlawfully. The proper procedure in this respect, either the lessee keeps the leased asset (Ayn) in his hands and the lessor adheres with the contract, for which rent is entitled for the remaining period, or the lessor approves rescission of the contract and hence entitlement for the rent of the remaining period would cease.

11- It is stated in some contracts that the lessor has the right to rescind the Ijara contract in case of the lessee default and that the lessor is entitled for the rent up to the end of the remaining period of the contract and until the latter sells the property, although of the rescission of Ijara. The above mentioned observation applies to this case, because if the contract is rescinded by the lessor, he has no right in the rent of the property after the date of rescission.

12- Some contracts stipulated that all maintenance costs to be borne by the lessee and that the lessor is not requested to perform any such duties, including his guarantee to competence of the property for residence. This is a rejected matter from Shariah point of view, because in Ijara contract, rent would not be entitled if the usufruct is not capable of making use of. This point in contracts may be included due to the fact that the parties consider the ownership of the property would be devolved to the lessee. However this would not necessitate release of the lessor from his liabilities under Ijara contract, as such condition is not Shariah accepted, and it should not be stated in the contract or at least reference to maintenance should

be not be declared in the contract. In these situations Shariah provisions should be applied and the lessor, in fact, assumes that the lessee would not claim maintenance from him, due to above mentianed consideration, without rendering this assumption into a condition.

13- Some contracts state that the lessee agrees that the lessor had not been liable for the contract provisions which has been entered between the lessee and the property sellor. In this respect, following two points should be considered:

1st : regarding denial of the lessor liability towards the contract entered with the property sellor. This is unacceptable in Shariah, because the property was possesed for the benefit of the lessor and so he is responsible for the obligations arising from such ownership.

2nd : regarding the lessee entering of the contract with the property sellor to purchase the property (the subject of Ijara). This necessitates making a text of proxy from the lessor to the lessee to enable the latter to act on his behalf.

14- The contract states explicitly that the lessee should pay the insurance premiums and also bears all liabilities in that respect. The proper procedure is that the lessor should bear insurance and not the lessee, because the lessor is the owner of the property and so the guarantee of ownership, including insurance, should be borne by the owner.

15- Some contracts state that in case of expropriation or seizure of the property and obtaining any returns, grants or compensations for that, it would be the right of the lessee and he assigns them as per contract to the lessor to settle any due amounts to him, and any excess to be used as a balance to pay the purchase price as per agreements. This statement is not proper from Shariah point of view, because in case of expropriation or seizure of the property, any acquired compensations would only be the right of the lessor alone, because he is the owner of property. However the lessee right is limited to halting the rent from the lessor up to providing him an alternative usufruct.

16- Some contracts provide the lessor, in certain specific cases, the right to sell the leased asset (Ayn) on the lessee`s account,

where as the sale price would be utilized to pay the purchase price promised with the lessee. In case it is more than the purchase price, the excess would be returned back to the lessee and also he is entitled to request the difference in case the price is less. This is unacceptable to Shariah, because if the property is sold, it would be for the account of the lessor, who is the owner of the property, and not on the account of the lessee, and the revert of the lessor on the lessee would only be within the limits of claiming compensation for the damage borne by him due to the lessee`s breach of his committed promise to purchase the leased asset (Ayn).

17- Most contracts state that only the lessee should bear any legal expenses related to enforcement of any rights or liabilities related to such contract. The proper procedure is that contracting expenses should be borne by the two parties due to the fact that both of them participated in the contract, which its usufruct would benefit both of them, so one party should not bear expenses without involving the other.

18- The purchase promise should be independent of the Ijara contract. There is no objection that entering the promise and signature of Ijara contract could be done simultaneously.

19- The Ijara contract should not be linked to the property sale contract, because they are two separate contracts.

20- The sale of the leased asset (Ayn) to the lessee should not be linked to the future, because sale should not be added i.e. no contract should be entered now and a date in the future fixed for realization of its consequences. However, sale contract should be effected when it is due at the end of Ijara contract, or they could revert to grant (Hiba) mode, which grant is dependent on completion of Ijara contract and settlement of all its installments.

21- A phrase stating that : ((without violating Islamic Shariah regulations)) should be included in the clause relating to the governing law of the contract. Although this a general requirement in all contracts, however it has its particular importance in Ijara Mintahia Biltamlik contract, because courts and laws which may be referred to may not observe Shariah

requirements and only give due consideration to mere legal points of view.

22- Certain trends give certain excuses to justify above mentioned actions on the grounds of being subordinate and inferior parts of the clauses constituting the contract such as maintenance, bearing leased asset (Ayn) risks, treatment of advance payments of the lessee and other items. In fact these are major subjects reflecting the real goal of the contract and so they are not subordinate forms, as claimed by some scholars who call for their postponement. These major elements specify the identity of the contract and whether it is proper or not. The real meaning of Ijara contract would be negated if the lessee bears maintenance or the risk of the leased asset (Ayn) depreciation or any other items.

23- Some legal consultants in formulating Ijara Wa Iqtina contracts for dealing in Islamic financial institutions, they consider only two requirements for the properness of the cotract. First, the contract should not result into debts with interest and the second is that payments are partly as consideration for the use of the

leased asset and part as consideration of price installments. They give no due consideration to any other Shariah provision which organize the Ijara contract, which should be observed. This conception deprives the contract of many important elements, because there are many provisions and controls which need to be considered in drafting the contract to render it Shariah acceptable.

4- Sometimes the excuse of observing the intent of equity in contracts, on which many scholars concentrate lead them only to consider that drafting of contracts should enable equity between the two parties, in such a way that the lessor and the lessee bear the same risks; the lessee may lose the earnest money (Urbon) and installment payments, while the lessor may lose part of his funds in case the lessee did not practice the option or purchase promise. So the lessor is compelled to sell the property and incur loss. In fact equity and justice is not just a matter of calculating risks between them, but is rather based on principles and provisions accepted by Shariah.

Mode of Lease Ending Into Ownership

Practiced by some Islamic Financial Institutions:

The client presents his application to the investment and fianance section of the company requesting entering into a transaction with him to provide his requirements of equipment on Ijara basis. As soon as payment is fully made for the equipment agreed value, the principal would be granted to him as a (hiba) at the end of the period or sold to him with a nominal price. The concerned section will request some of the client identification documents along with financial statements of the client to verify his ability to pay and experience in the field of the required equipment etc. before entering into any commitment with him. If the concerned section is satisfied, it will refer the file with the recommendation to the committee in charge of reviewing finance applications as per approved authorities. The committee will discuss the proposal submitted by the concerned section. Vote would be cast to approve the transaction or not. The concerned section would verbally inform the client of the result of the committee decision; either approval or conditional approval or rejection. In the latter case the

file would be closed and any documents to be returned to the client. In case of verbal acceptance of the client, a written offer would be sent to the client, stating the mechanism of dealing with the client, mode of settlement, installment amount, whether monthly or otherwise and the required guarantees and documents. He will be required to sign the offer and such signed offer by the client would be considered as one of the transaction documents.

It will be considered as (promise) agreement from AlBaraka or AlTawfik companies, in which all details are included. This agreement in itself is considered as a basic agreement and contains all rights, liabilities conditions. The agreement includes but not limited to the type of equipment, its source, size, installment amount, mode and mechanism of fixing installment, duration and lease period etc. as well as other settlement guarantees, text of lease contract to be signed later along with the conditions put forward by the company etc. . The client furnishes the required guarantees which were previously agreed upon by the parties. The client also specifies the date for receiving the leased asset (Ayn). He may pay part of the rent amount to prove his seriousness. This

amount is considered as a trust to be returned to the customer, if Ijara is not completed.

The company provides the required asset which is to be registered in the name of AlBaraka or AlTawfeek. (In certain cases the asset may be registered in the name of the lessee for regulatory purposes or to make use of exemptions, provided that a counter bond is taken from the client in this case).

The company receives the commodity purchase documents and pays the supplier its value directly.

The client and the company sign the Ijara contract stating the agreed upon rent by the lessee, in total amount (without separating the principal from the profit). AlBaraka or AlTawfeek delivers the original to the client.

The rent value may be amended by increase or decrease for a further period, which is not included in the contract by agreement of the two parties as per an appendix, which specifies the starting date of the period, its end and its rent value.

3- Sale of Time sharing rights:

3-1 Preface:

Many offers of time sharing were floated nowadays for sites in different tourist projects. They are offered to ease the lease burdens of a residence in countries bound for tourism and recreation. This procedure also gives its participants diversity of making use of time sharing in such sites in different parts of the world.

Following is the mechanism of time sharing mode:

The right of usufruct of the asset (Ayn) which is previously specified in terms of standard (including but not limited to, for example, each category has an specified area of the asset required to be usufruct of, in addition to the level of furnishing such an asset (Ayn))

-Possession period:

-The time duration previously contracted.

3-2 Possession Method:

A contract to be entered between the usufructuary (Mistanfia) and the owner in which it is stated that the right of the former (the Client) to reside in the unit (Ayn) which its standard is previously fixed (i.e. including but not limited to specifying a category with specific area of such asset (Ayn) for usufruct in addition to its level of furnishing) .

3-3 Other Conditions:

1- The original owner has the right to alter the usufruct right period by increase or decrease, depending on the site of (Ayn) to be usufruct of (for example if the usufructuary (Mistanfia) is interested in residing in an area of higher in costs or higher in standard compared to what he contracted for, or vice versa) .

2- The usufructuary (Mistanfia) should be committed to specify the date required for usufruct in advance and also he should specify the site.

3- The usufructuary (Mistanfia) has the right to assign his right of usufruct, within his specified period, to another person in the same year, against the extension of his usufruct period to an other year or dividing usufruct to two similar periods.

In consideration to above mentioned, some finance applications are received for such type of time sharing on Morabaha method (i.e. the purchase orderer applies that the finance house to purchase time sharing for him, on spot basis, provided that he is committed to purchase the same time sharing on credit).

For implementation of this procedure, the finance house would register the right of time sharing in its name, as a first step. Then it assigns the right to the purchase orderer and instructs the original project owner to approve the assignment of its right to the purchase orderer. So, the ownership of time sharing would be in his name for lifetime or for specific period, and he may sell the right to others.

3-4 Shariah consideration in this type of Ijara :

1- The lease (Ijara) is permissible for the first lessee (the finance house) to enter a second lease contract with the client, the so-called sub-lease.

2- A lease in which a lessee assigns the usufruct of an asset (Ayn) to another lessee, with the approval of the original asset (Ayn) owner, considering that the contract has been rescinded between the owner and the new lessee and a new contract is entered between the owner and the new lessee. This is often practiced for exigency i.e. contracting between the old and the new lessee and informing the owner to that effect, and considering his non-objection as an agreement for subrogation. Consequently it is assumed that rescission took effect and a new contract is entered.

3-5 Proposed Shariah Modes in this respect :

- The Ijara specified on liability which states the description, without determining the subject.
- The option of determination of the lessor and the lessee and the possibility of linking it with procedures and circumstances which give consideration to priority of showing interest and satisfaction of conditions instead of absolute discretion (deliberation and selection) .

3-6 Group Fatwa on Time Sharing:

AlBaraka Fourth Figh Symposium issued the following Fatwa regarding Time Sharing :

No objection from Shariah point of view for the purchase of time sharing right, by contracting to posses the usufruct of a property for specified time duration, without identifying a date, provided that buildings specifications are well described. Also according to Shariah no objection for entering successive time sharing rights purchase contracts, provided that their terms should not exceed the extent of usufruct in terms of place and time, in the first sale contract. In case of their lease, the utilization of lessee of its usufruct regarding fixing the date of usufruct should be according to the instructions put forward by the lessor or manager of property, in such away usufruct would be available for all lessees according to time duration contracted for with them. Accordingly the lessor keeps the right of determination option as per Shariah controls declared to the purchaser and the lessees. The leased asset (Ayn) either it would be owned by the lessor but not seen by the lessee, so it would be Ijara for specific described asset (Ayn), or it may not be owned by the lessor upon contracting but he will

acquire at the start of the period and so it is Ijara described in liability. In both cases specifications should be governed by well defined controls to evade ambiguity leading to dispute.

No objection for re-lease of such usufruct to other parties provided that utilization of usufruct should be within the limits of the first Ijara contract. There is also no objection that lease to be in deferred installments against rents which are higher than those specified in the Ijara contract originally entered with the owner of the asset (Ayn).

4- Lease Funds :

Lease Fund are based on operating Ijara and re-lease (or intermediary lessee mode) contracts. The assets of lease Funds may also include some applications of Ijara Wa AlIqtina, because the leased assets should not necessarily continue to be in their same state. Circumstances may require their renewal, by sale in advance or later sale for agreed upon lease in accordance with the term of Ijara Wa AlIqtina. Certain issues in lease funds regarding division

of assets into (units) or (shares), are not confined to lease only but are rather related to investments funds, such as :

- Evaluation of units, by type (entry or withdrawal price) or profits distribution.
- Mode of the fund management (on Modaraba or investment agency basis).
- Change of leased assets owners (on common basis) while the lease contract with lessees will continue, along with other items which need specification of accounting treatment.

5-Ijara Bonds:

Ijara bonds are different from Ijara itself, because they are a set of securities having certain characteristics which identity them from shares, loan bonds and other securities. They are a mean for financing middle and long term assets used in productive projects or public sector services. They could also be employed in deploying financial resources to finance development projects. The nature of these securities enable their issue by productive companies and establishments in lieu of the usurious loan bonds, because they represent real assets, and so can be circulated and make active primary and secondary money market. The principle of the (securitization) of Ijara mode has been linked with specific Shariah characteristics such as :

- Ability of the owner (the lessor) to dispose in his property, without inflicting damage to the lessee right to obtain the usufruct of Ijara contract.
- Properness of trade or sale of common items, because securities represent an object of Ijara owned by common securities holders.

- Permissibility of Ijara described in liability.
- Permissibility of adding Ijara to the future.
- The lessee may dispose of his possessed usufruct by leasing to others.
- Releasing Ijara period from any limitation.
- Possibility of awarding proxy for possessing the asset (Ayn) for the benefit of others and then leasing same for them.
- Flexibility in some maintenance types etc.

Circulation of Ijara bonds and other securities should be according to Shariah precepts relating to sale of money, debts, assets and usufruct. The principle of weighing the dominating items i. e. if the assets and utilities are more than debts and money; it is not conditional for circulation the similarity or simultaneous possession. Islamic Figh Academy issued resolution no. (5) in its Fourth Session regarding loan bonds and investment bonds which included Shariah provisions for their issue and circulation[78].

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78 Ijara bonds by Dr. Monzir Qahaf research, issued by Islamic Research and Training Institute.

General Precepts and Provisions which should be observed in the Ten Conditions:

All ten conditions and their equivalents in meaning should be observed in all following precepts :

1st : No condition would be considered unless being stipulated in Waqf deed.

2nd : Waqf donor (Waqif) may stipulate these ten conditions and their equivalents for himself or others such as those in charge (Mutuali).

3rd : If the Waqf donor (Waqif) stipulated some of amendment authority in conditions to other party, such party may not amend unless during the Waqif life time.

4th : Stipulation of amendment right or replacement of the endowed asset (Mouqouf) should be effected once whether such stipulation is for the Waqif himself or others, unless he is awarded the right of amendment repetition at his discretion.

5th : Such ten conditions and their equivalents would be abated by waiver.

If the party entitled for a condition right, whether from a Waqif, administrator or others, practiced the condition for one time, he has no right to repeat it, unless the Waqif stipulated that he may repeat it any time.

More details about replacement will be referred to in Chapter six, when describing costs of depreciations and Waqf assets replacement.

Above mentioned conditions regarding amendment, replacement or others are only related to Waqf dispositions and not Waqf guardianship (Wilaya). If the Waqf stipulated a condition to other party, the latter has no right to alter the Waqf guardianship (Wilaya) conditions. He is also not entitled to remove the administrator based on Waqif stipulation, although he has the right to remove him from entitlement.

6- Waqf Lease (Ijara) and controls :

It is agreed between jurists that the major precept for Waqf Ijara is to be according to estimated equivalent rent. Ibn Abdeen stated: ((Waqf Ijara should not be less than estimated equivalent rent, unless for necessity)). It is not allowed if it is grossly less, however it may be with minor loss, which is considered by some jurists as about the fifth.

If Ijara is less than the estimated equivalent rent according to above principle, and somebody offered Ijara with estimated equivalent rent, the person in charge (Mutuali), i.e. Waqf administrator, may rescind the first Ijara. In this case, the first lessee has the priority on others, if he accepted the increase according to Hanafi school, otherwise it could be leased to an other lessee, in case it is free of agriculture. However if the land is cultivated by the lessee, the increase of rent, would be charged up to harvesting the cultivation. This is because being occupied by plants would deprive the land from being properly leased to others, and after harvest the Ijara would be rescinded and leased to others.

In case Waqf land is occupied by buildings or plants and its estimated equivalent rent rose excessively, the increase would

either be due to construction and building or due to the increase in the land rent itself. In the first case, the increase in not obligatory on him, if he is the owner of the building.

However in case, for example, it is built according to estimated instructions of Waqf administrator, he should not bear the increase of rent, because it would be for the benefit of Waqf.

Maliki view that Ijara should not be rescinded if it is according to equivalent rent and for a specific period. Shafi also support this opinion. If the Ijara is less than estimated equivalent rent, and the rent is increased to the estimated equivalent rent, rescission would cease.

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